

A.F.R.

ORDER

OD – 1

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

ITA/153/2011
PAHARPUR COOLING TOWERS LTD.
VERSUS
COMMISSIONER OF INCOME TAX, CENTRE, CIRCLE-III, KOLKATA

BEFORE :

THE HON'BLE JUSTICE SURYA PRAKASH KESARWANI

AND

THE HON'BLE JUSTICE RAJARSHI BHARADWAJ

Date : 28th February 2024.

Appearance:

Mr. J. P. Khaitan, Senior Advocate
Mr. Somak Basu, Advocate
... for the appellant.

Mr. Vipul Kundalia, Advocate
Mr. Anurag Roy, Advocate
Ms. Oindrila Ghosal, Advocate
... for the respondent.

1. Heard Sri J. P. Khaitan, learned senior advocate assisted by Sri Somak Basu, learned counsel for the appellant assessee and Vipul Kundalia, learned senior standing counsel for the respondent.
2. This appeal was admitted by this Court by order dated 19.08.2011 on four substantial questions of law. Learned counsel for the appellant has stated that the appellant does not want to press the substantial

question of law No.3. Thus, this appeal is being heard on the following substantial questions of law:-

- 1) *Whether the learned Tribunal below committed substantial error of law in upholding the disallowance of Rs.44,03,373.68 Paise under Section 14A of the Income Tax Act, 1961 as interest expenditure incurred in relation to exempt of income from tax free bonds ?*
- 2) *Whether the learned Tribunal below committed substantial error of law in upholding the deduction of Rs.41,03,833/- from the unit dividend income as interest expenditure incurred in relation thereto and consequent reduction of relief under section 80M of the Income-tax Act, 1961 by Rs.24,62,300/- was arbitrary, unreasonable and perverse ?*
- 4) *Whether the learned Tribunal below committed substantial error of law in rejecting the ground taken by the appellant against interest under section 201(1A) of the Act, amounting to Rs.10,48,423/- charged in the order under section 143(3) of the Act and in not considering and deciding the appellant's contention that no interest was chargeable in view of the provisions of Rule 119A(a) of the Income-tax Rules, 1962 ?*

Facts:-

3. Briefly stated facts of the present case are that for the assessment year 1990-91 the assessing officer passed an assessment order dated 31.3.1993 whereby he disallowed interest on borrowed capital under Section 14A of the Income Tax Act, 1961 (hereinafter referred to as the 'Act, 1961'), allowed lesser deduction under Section 80M of the Act,

1961 on the income from dividends (full amount of dividend – interest on borrowed capital utilized for investment in units of UTI) as against the claim of the assessee for deduction under Section 80M of the Act, 1961 on the full amount of dividend; and ordered for interest under Section 201(1A). The assessing officer also made certain additions/disallowances to which we are not concerned in the present appeal inasmuch as the assessee subsequently either succeeded with respect to such other additions/disallowances before Tribunal or has given up the point by not pressing substantial question of law no.3.

4. Aggrieved with the assessment order, the assessee filed an appeal No.7/CIT(A)-X/Cir.10/03-04 which was partly allowed by the Commissioner of Income Tax (Appeals)-X, Kolkata by order dated 14.11.2006. Aggrieved with the order of the CIT(A), the assessee filed an appeal being ITA No.555/Kol/2007 before the Income Tax Appellate Tribunal, Bench-“A”, Kolkata (ITAT) which was partly allowed by the ITAT. Aggrieved with the aforesaid order of the ITAT dated 25.03.2011, the assessee has filed the present appeal which has been admitted by this Court by order dated 19.08.2011 on the substantial questions of law as afore-quoted.

Submissions:

5. Sri J. P. Khaitan, learned senior advocate for the appellant/assessee submits as under:

- i) The entire amount of interest on borrowed capital being an expenditure relating to the business of the assessee, was allowable as deduction which was wrongly disallowed by the assessing officer and upheld by the Tribunal. The tax free bonds were purchased by the assessee as part of his business activity and subsequently when the bonds were sold, the surplus/loss became part of taxable income of the assessee. The loss suffered by the assessee on account of sale of the aforesaid bonds was itself treated by the assessing officer as business loss while determining the income of the assessee for the assessment year in question.
- ii) Even if the entire amount of interest was not allowable, then only the amount of interest as may be apportioned for the tax-free income i.e., tax-free interest on bonds could have been disallowed and the rest of the interest was allowable as deduction even after the enforcement of Section 14A of the Act, 1961. Thus, only that part of interest on borrowed capital which is relatable to the tax-free income i.e., tax-free interest on bonds could be disallowed and could be subjected to tax as income in the hands of the assessee.
- iii) Section 80M read with Section 80AA of the Act, 1961 provides for deduction @ 60% on the income by way of dividend from a domestic company. Therefore, the entire amount received as dividend was the income from dividend and, as such, deduction under Section 80M was allowable on the entire amount of dividend. Reliance is placed upon a

co-ordinate Bench judgment of this Court in Commissioner of Income Tax vs. National and Grindlays Bank Ltd. reported in (1993) 202 ITR 559 (Cal) and Commissioner of Income Tax vs. Kanoria Investments (P) Ltd. reported in (1998) 232 ITR 7 (Cal) and a judgment of the Hon'ble Supreme Court in Maxopp. Investment Ltd. vs. Commissioner of Income Tax, reported in (2018) 301 CTR (SC) 489.

- iv) Imposition of interest under Section 201(1A) by the assessment order was totally illegal as neither a separate order was passed by the assessing officer for interest under Section 201(1A) nor any opportunity of hearing was afforded nor any reasons have been recorded while imposing interest under Section 201(1A) of the Act, 1961. ITAT has held that a separate order was required to be passed by the assessing officer and yet the ITAT rejected the point on the ground that a separate appeal has not been filed. Thus, even though on the facts and findings recorded by the ITAT, no separate order passed by the assessing officer under Section 201(1A) of the Act and yet imposition of interest has been affirmed on a totally illogical ground that a separate appeal has not been filed by the assessee.

6. Sri Vipul Kundalia, learned counsel for the revenue, submits as under:-

- (i) The co-ordinate Bench judgments of this Court in National and Grindlays Bank Limited (supra) and in Kanoria Investments (P) Limited (supra) relied by learned counsel for the appellant are per

inquirium inasmuch as in both the aforesaid judgments of the co-ordinate Bench of this Court, the Constitution Bench judgment of Hon'ble Supreme Court in Distributors (Baroda) Private Limited v. Union of India & Others [1986] 1 SCC 43 (paragraphs 12-19) settling the law on the question i.e. with respect to computation of deduction under Section 80M, was not noticed by the co-ordinate Benches. Thus, both the aforesaid judgments of this Court are per inquirium. The Constitution Bench of Hon'ble Supreme Court holds the field. The view taken by the ITAT in the impugned order is wholly in consonance with the law laid down by the Constitution Bench in the case of Distributors (Baroda) Private Limited (supra).

- (ii) The disallowance of interest on tax-free bonds in view of Section 14A of the Act 1961 is wholly justified and correct inasmuch as the assessee borrowed money to invest in bonds carrying tax-free interest. The judgment of Hon'ble Supreme Court in Maxopp. Investments Limited (supra) relied by learned counsel for the appellant assessee is distinguishable in view of the law clarified by Hon'ble Supreme Court in subsequent judgment in South Indian Bank Limited v. Commissioner of Income Tax [2021] 10 SCC 153 (paragraphs 31 and 32). Therefore, the impugned order passed by the Tribunal does not require any interference.

- (iii) The interest under Section 201(1A) was lawfully imposed by the assessing officer and the ITAT has correctly dismissed the appeal of the assessee on the point of imposition of interest.

Discussion and Finding:-

Substantial Question of Law No.1

7. In the assessment order, the assessing officer has recorded a finding of fact that the assessee is engaged in the business of manufacture, supplies, exports, erections, installations and commissioning of wide range of cooling towers etc., manufacture, supplies and export of high density polypropylene woven bags for use in packing of fertilisers, cement, chemicals, grains etc. and investment in stocks of securities from time to time. As per book results, the total sale of the assessee including sales of bonds of public sector undertakings and units of UTI was Rs.14,722.56 lakh resulting in a net profit of Rs.973.61 lakh which includes tax-free interest on bonds. After reducing the amount of tax-free interest on bonds, the net profit came to Rs.7,67,70,836/- as mentioned by the assessing officer in the computation part of the assessment order. This net profit was arrived after deducting interest on borrowed capital said to have been utilised for investment in units of UTI which was (interest amount) Rs.4,03,833/-. The assessing officer has not disallowed the interest claimed as business expenditure by the assessee. He made certain additions which included the interest paid

on loans used for investment in tax-free bonds. The interest so disallowed and added to income was Rs.50,05,240/- which was reduced by the Tribunal to Rs.44,03,373.68. This amount is in dispute in the present appeal referable to substantial question of law No.1.

8. The assessing officer noted in the assessment order that the interest paid on borrowed capital utilised to earn tax-free interest on bonds is liable to be disallowed in view Section 14A of the Act 1961. In paragraph 5 of the assessment order the A.O. has given details of investment in public sector bonds from borrowed capitals, which discloses that the investment was made by the assessee in public sector bonds on various dates. **The bonds of American Express Bank Limited were purchased between 12.07.1989 and 06.11.1989. The bonds of M/s. Canbank Financial Services Limited were purchased between 29.03.1989 and 28.04.1989. The bonds of Peerless General Finance and Investment Limited were purchased between 31.05.1989 and 29.03.1990. Certain bonds were purchased through M/s. Rahul & Co. between 12.05.1989 and 28.12.1989.** From paragraph 5 of the assessment order, it is evident that the **finance of Rs.7.25 crore was made available on 08.05.1989 which was repaid by the assessee to the lenders on 05.07.1989 (Rs.3.25 crore) and on 31.07.1989 (Rs.4 crore).** Thus, the amount borrowed on 08.05.1989 was repaid by the assessee on 05.07.1989 and 31.07.1989, whereas the

bonds purchased by the assessee were sold substantially after repayment of loan.

9. Thus, the entire borrowed finance of Rs.7.25 crores was repaid by the assessee, on 5/7/1989 Rs.3.25 crores and on 31.07.1989 Rs. 4 crores. The purchases of bond of American Express Bank Ltd. were made between 12.7.1989 and 6.11.1989 on eight dates. The purchases of bonds of Can Bank Financial Services Limited were made between 29.3.1989 and 28.4.1989 on four dates. The bonds of M/s. Peerless General Finance and Investment Co. Limited were purchased between 31.5.1989 and 29.3.1990 on five dates. Thus the **purchases of bonds of M/s. Can Bank Financial Services Limited were made prior to the arrangement of finance of Rs.7.25 crores. Except the first purchase of bonds of American Express Bank Limited on 12.7.1989, rest of purchases of bonds were made after repayment of the finance.** Except the purchase of bonds of M/s. Peerless General Finance & Investment Co. Limited made on 31.5.1989, 26.6.1989 and 21.7.1989. The rest of the **bonds of Peerless General Finance & Investment Co. Ltd. were purchased on 18.8.1989 and 29.3.1990 and 12.3.1990 i.e., much subsequent to the repayment of the aforesaid finance.**
10. As per chart extracted in paragraph 5 of the assessment order the bonds of M/s. Peerless General Finance & Investment Co. Ltd. were sold

on 17.7.1989, 26.7.1989, 7.8.1989, 4.9.1989, 6.3.1990 and 30.3.1990. Thus, **except the sales made on 17.7.1989 and 26.7.1989 the bonds of M/s. Peerless General Finance & Investment Co. Ltd. were sold by the assessee much after the repayment of the aforesaid finance of Rs.7.25 crores.**

11. Thus, it can be safely concluded on the basis of facts and figures noted in the assessment order that the investment in bonds and units were part of business activity of assessee and the entire capital/fund available to the assessee either as its own fund or as borrowed capital was a common pool, out of which purchases/investments were made from time to time and were also sold. Therefore, the inference drawn by the fact finding authorities that the entire investment in tax free bonds were from the borrowed finance, is apparently incorrect and perverse.
12. In view of the facts aforementioned, the findings recorded by the ITAT in paragraph 10.1 and 11 of the impugned order that the assessee made investments out of borrowed funds and utilised the borrowed funds for the purposes of investments, shares and units; cannot be said to be correct in view of the facts noted above by us which emerges from the assessment order itself.
13. In **Maxopp. Investment Ltd. Vs. Commissioner of Income Tax; 2018(1) 301 CTR (SC) 489** (paragraphs 34 to 41) Hon'ble Supreme Court explained the provisions of Section 14A and held as under:

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 assessee would apply while interpreting s. 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 Ltd. 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. 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 this objective behind s. 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 s. 14A of the Act.** This is so held in *Walford Share & Stock Brokers (P) Ltd.* (supra), 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 s. 14A.

The theory of apportionment of expenditure between taxable and non-taxable has, in principle, been now widened under s. 14A."

35. *The Delhi High Court, therefore, correctly observed that **prior to introduction of s. 14A of the Act**, the law was that when an assessee had a composite and indivisible business which had elements of both taxable and non-taxable income, the entire expenditure in respect of said business was deductible and, in such a case, the principle of apportionment of the expenditure relating to the non-taxable income did not apply. The principle of apportionment was made available only where the business was divisible. **It is to find a cure to the aforesaid problem that the legislature has not only inserted s. 14A** by the Finance (Amendment) Act, 2001 but also made it retrospective, i.e., 1962 when the IT Act itself came into force. The aforesaid intent was expressed loudly and clearly in the Memorandum Explaining the Provisions of the Finance Bill, 2001. We, thus, agree with the view taken by the Delhi High Court, and are not inclined to accept the opinion of Punjab & Haryana High Court which went by dominant purpose theory. The aforesaid reasoning would be applicable in cases where shares are held as investment in the investee-company, may be for the purpose of having controlling interest therein. On that reasoning, appeals of Maxopp Investment Ltd. as well as similar cases where shares were purchased by the*

assesseees to have controlling interest in the investee companies have to fail and are, therefore, dismissed.

36. There is yet another aspect which still needs to be looked into. What happens when the shares are held as 'stock-in-trade' and not as investment', particularly, by the banks ? On this specific aspect, CBDT has issued Circular No. 18 of 2015, dt. 2nd Nov., 2015.

37. This circular has already been reproduced in para 19 above. This circular takes note of the judgment of this Court in Nawanshahar case (supra) wherein it is held that investments made by a banking concern are part of the business or banking. Therefore, the income arises from such investments is attributable to business of banking falling under the head 'Profits and gains of business or profession'. On that basis, the circular contains the decision of the Board that no appeal would be filed on this ground by the officers of the Department and if the appeals are already filed, they should be withdrawn. A reading of this circular would make it clear that the issue was as to whether income by way of interest on securities shall be chargeable to income-tax under the head 'Income from other sources or it is to fall under the head 'Profits and gains of business or profession'. The Board, going by the decision of this Court in Nawanshahar case (supra), clarified that it has to be treated as income falling under the head 'Profits and gains of business or profession'. The Board also went to the extent of saying that this would not be limited only to co-operative societies/banks claiming deduction under s. 80P(2)(a)(i) of the

Act but would also be applicable to all banks/commercial banks, to which Banking Regulation Act, 1949 applies.

38. From this, Punjab & Haryana High Court pointed out that this circular carves out a distinction between 'stock-in-trade' and 'investment and provides that if the motive behind purchase and sale of shares is to earn profit, then the same would be treated as trading profit and if the object is to derive income by way of dividend then the profit would be said to have accrued from investment. To this extent, the High Court may be correct. At the same time, we do not agree with the test of dominant intention applied by the Punjab & Haryana High Court, which we have already discarded. In that event, the question is as to on what basis those cases are to be decided where the shares of other companies are purchased by the assesseees as 'stock-in-trade' and not as investment'. We proceed to discuss this aspect hereinafter.

39. In those cases, where shares are held as stock-in-trade, the main purpose is to trade in those shares and earn profits therefrom. However, we are not concerned with those profits which would naturally be treated as 'income' under the head 'Profits and gains of business or profession'. What happens is that, in the process, when the shares are held as 'stock-in-trade', certain dividend is also earned, though incidentally, which is also an income. However, by virtue of s. 10(34) of the Act, this dividend income is not to be included in the total income and is exempt from tax. This triggers the applicability of s. 14A of the Act which is based on the theory of apportionment of expenditure between taxable and non-taxable income as held

in Walfort Share & Stock Brokers (P) Ltd. case (supra). Therefore, to that extent, depending upon the facts of each case, the expenditure incurred in acquiring those shares will have to be apportioned.

40. We note from the facts in the State Bank of Patiala case (supra) that the AO while passing the assessment order, had already restricted the disallowance to the amount which was claimed as exempt income by applying the formula contained in r. 8D of the Rules and holding that s. 14A of the Act would be applicable. In spite of this exercise of apportionment of expenditure carried out by the AO, CIT(A) disallowed the entire deduction of expenditure. That view of the CIT(A) was clearly untenable and rightly set aside by the Tribunal. Therefore, on facts, the Punjab & Haryana High Court has arrived at a correct conclusion by affirming the view of the Tribunal, though we are not subscribing to the theory of dominant intention applied by the High Court. It is to be kept in mind that in those cases where shares are held as 'stock-in-trade', it becomes a business activity of the assessee to deal in those shares as a business proposition. Whether dividend is earned or not becomes immaterial. In fact, it would be a quirk of fate that when the investee company declared dividend, those shares are held by the assessee, though the assessee has to ultimately trade those shares by selling them to earn profits. The situation here is, therefore, different from the case like Maxopp Investment Ltd. where the assessee would continue to hold those shares as it wants to retain control over the investee company. In that case, whenever dividend is declared by the investee company that would necessarily be earned by the assessee and the assessee

alone, Therefore, even at the time of investing into those shares, the assessee knows that it may generate dividend income as well and as and when such dividend income is generated that would be earned by the assessee. In contrast, where the shares are held as stock-in-trade, this may not be necessarily a situation. The main purpose is to liquidate those shares whenever the share price goes up in order to earn profits. In the result, the appeals filed by the Revenue challenging the judgment of the Punjab & Haryana High Court in State Bank of Patiala (supra) also fail, though law in this respect has been clarified hereinabove.

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

14. In **South Indian Bank Limited Vs. Commissioner of Income Tax, (2021) 10 SCC 153** (paragraphs 31 and 32) Hon'ble Supreme Court again explained the provisions of Section 14A of the Act 1961, in the matter and held as under:

“31. The aforesaid discussion and the cited judgements advise this Court to conclude that the proportionate disallowance of interest is not warranted, under Section 14-A of the Income Tax Act for investments made in tax-free bonds/securities which yield tax-free dividend and interest to assessee Banks in those situations where, interest-free own funds available with the assessee, exceeded their investments. With this conclusion , we unhesitatingly agree with the view taken by the leaned ITAT favouring the assessees.

32. The above conclusion is reached because nexus has not been established between expenditure disallowed and earning of exempt income. The respondents as earlier noted, have failed to substantiate their argument that the assessee was required to maintain separate accounts. Their reliance on Honda Sie to project such an obligation on the assessee, is already negated. The learned counsel for the Revenue has failed to refer to any statutory provision which obligates the assessee to maintain separate accounts which might justify proportionate disallowance.”

15. Section 14A of the Act, 1961 provides and makes a provision with respect to expenditure incurred in relation to income not includable in the total income. It provides that for the purposes of computing the total income under this Chapter (Chapter IV), no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of total income under the Act. The proviso to Section 14A was inserted by Finance Act, 2022 with retrospective effect to which we are not concerned in the present set of facts inasmuch as

the assessment year involved in the present appeal is the A.Y. 1990-1991.

16. Section 14A prohibits deduction of an expenditure incurred by an assessee in relation to income which does not form part of the total income under the Act, 1961. Therefore, the expenditure incurred by the assessee in relation to income i.e., the tax free interest which does not form part of total income under the Act, 1961, is not allowable.
17. The first contention of learned Counsel for the appellant cannot be accepted being in conflict of Section 14A of the Act, 1961. The phrase “in relation to income which does not form part of total income under the Act” means that if an income does not form part of total income, the related expenditure is not allowable as revenue expenditure. Thus, principle of apportionment is clearly engrained in Section 14 A of the Act, 1961. Where shares or units or bonds are held as stock-in-trade, the main purpose is to trade in shares or units or bonds and earn profit therefrom and the profit so earned would naturally be treated as “Profits and gains of business or profession”. Incidentally, dividend on shares or tax free interest on bonds is earned which are exempt from income tax, then Section 14 A comes into play, which is based on theory of apportionment of expenditure between taxable and non taxable income.
18. In the present set of facts, the assessing officer although noted certain facts and figures in paragraph 5 and certain other paragraphs of the

assessment order which discloses that the assessee was also engaged in the business of purchase and sale of bonds and units and it was only for a period of about 2.1/2 months that he borrowed a sum of Rs.7.25 crores whereas the purchases of tax free bonds were made even prior to taking finance and subsequent to the repayment of finance. Therefore, when the Tribunal or the authorities below were of the view that interest on finance taken by the assessee was invested in the tax free bonds which earned some tax free income, then they must have applied their mind on the questions of apportionment, particularly in view of the law laid down by Hon'ble Supreme Court in the case of *Maxopp. Investment Ltd. (supra)* and *South Indian Bank Limited (Supra)* afore-quoted.

19. We are of the view that since the impugned order of the ITAT suffers from perversity and examination of facts needs to be made by the fact finding authority i.e., the Assessing Officer with regard to apportionment or proportionate disallowance, therefore on the aforequoted substantial question of law No.(1) the case deserves to be remanded to the assessing officer. The substantial question of law No.(1) is answered accordingly and the matter is remanded to the assessing officer for apportionment or proportionate disallowance of the interest incurred as expenditure, to the extent related to the tax free interest on bonds.

Substantial Question of Law No.(2):

20. With regard to the **substantial question of law no.(2)**, we find that a co-ordinate Bench of this Court in National Grindlays Bank (supra) and Kanoria Investment Pvt. Ltd. (supra) held that the deduction under Section 80 M of the Act, 1961 will have to be allowed on the entire amount of dividend. These judgments are in conflict with the law laid down by Constitutional Bench of the Hon'ble Supreme Court in **Distributors (Baroda) Pvt. Ltd. Vs. Union of India& Ors., (1986) 1 SCC 43** (paragraphs 12 to 19) which were not noticed by the coordinate Benches of this Court. In Distributors (Baroda) Pvt. Ltd. (Supra) the Constitution Bench of Hon'ble Supreme Court held that deduction under Section 80M is liable to be calculated with reference to the amount of dividend computed in accordance with the provisions of the Act and forming part of gross total income **and not with reference to the full amount of dividend received by the assessee.** The aforesaid judgment of Hon'ble Supreme Court was rendered in the year 1985 while the aforesaid two judgments of Coordinate Bench of this Court are later judgments taking contrary view. It appears that aforesaid judgment of Hon'ble Supreme Court was not noticed by the Coordinate Benches of this Court in the aforesaid two judgments. Therefore, the judgments of Coordinate Benches of this Court in the case of National And Grindlays Bank Ltd. (Supra) and in Kanoria Investments (P.) Ltd. (Supra) are per incuriam and are not binding precedent. On Section 80M the aforesaid judgment of Hon'ble Supreme Court in Distributors

(Baroda) Pvt. Ltd. (supra) is binding. The view taken by the ITAT in the impugned order is in consonance with the law laid down by Hon'ble Supreme Court.

Per incuriam:

21. A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covers the case before it or when it has acted in ignorance of a law laid down by the Hon'ble Supreme Court or when the decision is given in an ignorance of the terms of a statute or rule having statutory force. Thus, the rule of per incuriam can be applied where a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue, vide Dr. Shah Faesal & Ors. Vs. Union of India & Anr. (2020) 4 SCC 1 (paragraph 31) and the State of Bihar Vs. Kalika Kuer alias Kalika Singh and Ors. (2003) 5 SCC 448 (paragraph 5 to 9). Since in the present set of facts the co-ordinate Bench of this Court in the case of National and Grindlays Bank Limited (supra) and Kanoria Investment Pvt. Ltd. (supra) have taken the aforesaid view without noticing the Constitutional Bench of the Hon'ble Supreme Court in the case of Distributors (Baroda) Pvt. Ltd. (supra). Therefore, we hold that the aforesaid two judgments of co-ordinate Bench of this Court are per incuriam.

22. In view of the law laid down by the Constitution Bench of Hon'ble Supreme Court in Distributors (Baroda) Pvt. Ltd.(Supra), we do not find any illegality in the impugned order of the ITAT so far as the substantial question of law no.2 is cornered. Therefore, the substantial question of law No. (2) is answered in favour of the revenue and against the assessee. The appeal of the assessee on this substantial question of law deserves to be dismissed.

23. With regard to substantial question of law No. (4), we find that in paragraph 73.1 of the impugned order of the ITAT has recorded the finding as under :

“73.1 However, in respect of interest chargeable under section 201(1A) of the Act, a separate order is required to be passed by the authorities below and accordingly separate appeal is to be filed by the assessee. Hence, the said ground is not considered by us in the absence of any details and discussions in the orders of the authorities below. Accordingly, Ground No.15 of the appeal taken by the assessee is rejected.”

24. It is wholly unreconcilable and totally unjustified that when the ITAT has itself found that a separate order was required to be passed for interest chargeable under Section 201(1A) of the Act, 1961 and the assessing officer has not passed a separate order then dismissing the appeal for the aforequoted reason cannot be sustained. Therefore, the substantial question of law No. (4) is answered in favour of the assessee

and against the revenue. The appeal with regard to the substantial question of law No. (4) is allowed.

25. For all the reasons afore-stated, the appeal [ITA/153/2011] is **partly allowed** to the extent indicated above and substantial question of law Nos. (1), (2) and (4) are answered accordingly. Case is remanded to the Assessing Officer for decision afresh on the substantial question of law No.1 for apportionment of expenditure (interest paid on finance) in terms of the law laid down by Hon'ble Supreme Court in Maxopp Investment Ltd.(Supra).

(SURYA PRAKASH KESARWANI, J.)

(RAJARSHI BHARADWAJ, J.)