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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: 06.12.2024

+ **ITA 193/2024**

PR. COMMISSIONER OF INCOME TAX -7,
DELHI

.....Appellant

Through: Mr Puneet Rai, SSC, Mr Ashvini
Kumar and Mr Rishabh Nangia, SCs
and Mr Nikhil Jain, Advocate.

versus

PUNJAB NATIONAL BANK

.....Respondent

Through: Mr S Krishnan and Mr Harshit
Chauhan, Advocates.

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

VIBHU BAKHRU, ACJ (ORAL)

CM No. 18004/2024 (for condonation of delay)

1. There is an inordinate delay in filing the present appeal, however, the learned counsel appearing for the Assessee submits that the issues raised are covered in favour of the Assessee. Moreover, the learned counsel appearing for the Revenue does not seriously object to condonation of delay in filing the appeal. Accordingly, the application is allowed.

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2. The Revenue has filed the present appeal under Section 260A of the Income Tax Act, 1961 (hereafter *the Act*), impugning an order dated



09.01.2019 (hereafter *the impugned order*) passed by the Income Tax Appellant Tribunal (hereafter the *ITAT*) in cross appeals for assessment year (AY) 2009-10 being ITA No. 2406/Del/2013 (by Assessee) and ITA No. 2966/Del/2013 (by Revenue).

3. The respondent (hereafter *the Assessee*) filed its return of income for AY 2009-10 declaring an income of ₹47,05,64,49,815/-. The same was picked up for scrutiny and the assessment proceedings culminated in an assessment order dated 19.12.2011 passed under Section 143(3) of the Act assessing the Assessee's income at ₹49,51,49,52,704/-.

4. A tabular statement setting out the additions made by the Assessing Officer (AO) is set out below:

S. No.	Particulars	Amount (Rs.)
1.	Loss on shifting of securities from AFS/HFT category to HTM category	2,00,000/-
2.	Additional contribution made to PNB Employees' Pension Fund Trust	111,69,00,000
3.	Disallowance under section 14A	133,16,00,000
4.	Deduction under section 36(1)(viii)	111,42,00,000
5.	Depreciation on goodwill	2,58,34,887
6.	Loss on revaluation of investment held under HTM category	338,13,24,273
7.	Expenses on Penal Nature	2,25,617

5. The Assessee successfully appealed the said assessment order before the Commissioner of Income Tax (Appeals) [hereafter *CIT(A)*]. The *CIT(A)*



passed an order dated 22.02.2013 accepting the Assessee's contention on all issues except on the issue of disallowance of expenses of penal nature.

6. The Revenue filed an appeal before the learned ITAT (being ITA no.2966/Del/2013, which was dismissed by the impugned order.

7. The Revenue has proposed the following questions for consideration of this court:

- a. Whether in the facts and circumstances of the case and in law, ITAT erred in deleting the addition of Rs. 133,16,00,000/- made under section 14A IT Act read with rule 8D of the IT Rules without appreciating the fact that the assessee earned exempt income of Rs. 202,74,24,616/- during the previous year?
- b. Whether in the facts and circumstances of the case and in law, ITAT erred in holding that section 14A of the IT Act was not applicable to the assessee?
- c. Whether in the facts and circumstances of the case and in law, ITAT erred in deleting the addition of Rs. 338,13,24,273/- made on account of loss on revaluation of investment ignoring the fact that losses are notional and are not allowable nature?
- d. Whether in the facts and circumstances of the case and in law, ITAT erred in deleting the addition of Rs. 2,00,000/- made on account of loss on shifting of securities from AFS/HFT category to HTM category ignoring the fact that the losses are notional and are not allowable?
- e. Whether in the facts and circumstances of the case and in law, ITAT erred in allowing deduction credited to PNB Employees' Pension Fund under section 43B of the IT Act even when the amount was not payable as per terms and conditions of the pension fund?"

8. The first two questions relate to the disallowance of expenses under



Section 14A of the Act read with Rule 8D of the Income Tax Rules, 1962 (hereafter *the Rules*). The AO had noted that the Assessee had earned income to the extent of ₹202.74 crores, which was exempt from tax. However, he had offered only a sum of ₹12.07 crores as disallowance under Section 14A of the Act.

9. It was the Assessee's contention that its exempt income was only ₹174.74 crores and was from investments held as stock in trade. The Assessee claimed that its exempt income was only incidental and it had not held investments for the purposes of earning exempt income. Nonetheless, the Assessee offered a sum equivalent to 0.5% as disallowance in respect of exempt income. However, the AO applied Rule 8D of the Rules and quantified the disallowance at ₹145.23 crores. After setting out an amount of ₹12.07 crores offered by the Assessee, the AO made an addition of ₹133.16 crores.

10. The learned CIT(A) allowed the Assessee's appeal, relying on the decision of this court in *Maxopp Investments Ltd. v. Commissioner of Income Tax and Other Connected Appeals: (2012) 347 ITR 272*. The learned ITAT confirmed the learned CIT(A)'s finding, relying upon decision of the Supreme Court in *Maxopp Investment Limited v. CIT, New Delhi: (2018) 402 ITR 640 (SC)* as well as *PCIT v. State Bank of Patiala: (2017) 78 taxmann.com 3 (SC)*. The relevant extract of the said order is set out below:

“8. We have carefully perused the decision in the case of Maxopp Investment Ltd versus CIT (2018) 91 taxman.com 154 (SC) wherein the Hon'ble Apex Court considered two cases



wherein the question of predominant intent of investment in shares was pleaded, though on different facts, on the ground that the objective of investing in shares was not to earn the dividend income, but to either retain controlling interest over the company in which the investment was made or to earn the profit from trading in shares. The question was whether the disallowance under section 14A of the Act could be invoked in the cases where exempt income was earned from shares held as “trading assets” or “stock in trade”. The first case relates to Maxopp investment Ltd and the second case relates to the case of State Bank of Patiala. In the case of Maxopp investment Ltd., the assessee company is in the business of finance, investment and was dealing in shares and securities; that they held the shares and securities, partly as investments on the “capital account” and partly as “trading assets” for the purpose of acquiring and retaining control over its group companies, primarily Max India Ltd.; and that the profits resulting on the sale of shares held as trading assets were duly offered to tax as business income of the assessee. In the case of State Bank of Patiala the assessee has exempt income in the form of dividend was earned by the bank from securities held by as stock in trade. The Hon’ble Supreme Court was considering the question that has arisen under varied circumstances where the shares/stocks were purchased by a company for the purpose of gaining control over the said company or as “stock in trade”, though incidentally income is also generated in the form of dividends as well.

9. It was argued before the Hon’ble Apex Court that though incidentally income was also generated in the form of dividends, the dominant intention for purchasing the shares was not to earn the dividend income but to acquire and retain the controlling business in the company in which shares were invested, or for the purpose of trading in the shares as business activity. After considering the entire case law on this aspect in the light of the peculiar facts involved in both the matters, the Hon’ble Apex Court vide paragraph No. 39 and 40 held as follows:-

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 from business and 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 Section 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 Section 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 and Stock Brokers P Ltd. case. 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 cases 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 Rule 8D of the Rules and holding that section 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 ITAT. Therefore, on facts, the Punjab and Haryana High Court has arrived at a correct conclusion by affirming the view of the ITAT, 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 and Haryana High Court in State Bank of Patiala also fail, though law in this respect has been clarified hereinabove.

10. It is, therefore, clear from the above observations of the Hon'ble Apex Court that depending upon the facts of each case, the expenditure incurred in acquiring the shares will have to be apportioned. Hon'ble Apex Court held that the Tribunal and the Hon'ble High Court of Punjab and Haryana arrived at a correct conclusion by setting aside the disallowance under section 14A of the Act in respect of the dividend earned on the shares held as stock in trade, because such shares were held during the business activity of the assessee and it is only by a quirk of fate that when the investee company declared dividend, those shares were held by the assessee, though the assessee has to ultimately trade those shares by selling them to earn profits.

11. Hon'ble Apex Court made clear distinction of this case



from the case of Maxopp investment Ltd where the assessee knew that whenever dividend would be declared by the investee company such dividend would necessarily be earned by the assessee and assessee alone, and it would be in the common knowledge of the assessee that such shares would generate dividend income as well as and when such dividend income is generated that would be earned by the assessee only. Hon'ble Apex Court in unequivocal terms held that in contrast, where the shares are held as stock in trade, this may not be necessarily a situation and the main purpose was to liquidate those shares whenever the share price goes up in order to earn profits. Hon'ble Apex Court, therefore, while rejecting the theory of dominant purpose in making investment in shares-whether it was to acquire and retain controlling interest in the other company or to make profits out of the trading activity in such shares - clearly made a clear distinction between the dividend earned in respect of the shares which were acquired by the assessee in their exercise to acquire and retain the controlling interest in the investee company, and the shares that were purchased for the purpose of liquidating those shares whenever the share price goes up, in order to earn profits. It is, therefore, clear that though not the dominant purpose of acquiring the shares is a relevant for the purpose of invoking the provisions under section 14 A of the Act, the shares held as stock in trade stand on a different pedestal in relation to the shares that were acquired with an intention to acquire and retain the controlling interest in the investee company.

12. Further, it is brought to our notice that in assessee's own case in ITA No.1519/Del/2016 and 7106/Del/2017 for the assessment year 2012-13, a coordinate bench of this Tribunal considered the arguments on either side and reached the conclusion that, insofar as the assessee bank is concerned section 14A of the Act has no application in view of the above law laid down by the Hon'ble Apex Court in the case of Maxopp investments Ltd, (supra).

13. We, therefore, while respectfully following the above decision, hold that no addition in case of the assessee under section 14-A is sustainable. Hence, ground of appeal of



assessee is allowed and the ground of appeal of the Revenue is dismissed.”

11. Concededly, the said issue is also covered by the decision of the Supreme Court in *South Indian Bank Ltd. v. Commissioner of Income Tax: (2021) 130 taxmann.com 138 (SC)*.

12. The third question relates to an addition of ₹338,13,24,273/-. The Assessee had claimed the said amount on account of amortization of premium on securities held maturity (HTM). A similar question had also arisen in earlier assessment years.

13. The learned counsel for the parties submits that whilst the Revenue has challenged the learned ITAT's order in respect of the AY 2005-06 and 2006-07, no question of law was framed by this court in ITA No.960/2018. The order dated 22.03.2024 passed by this court in ITA No.960/2018, which relates to the AY 2006-07 indicates that no question of law was framed by this court on the said issue.

14. Mr Rai, the learned counsel appearing on behalf of the Revenue confirms that in fact the Revenue did not project any question on the said issue in ITA No.960/2018 in respect of the AY 2006-07.

15. Apart from the fact that the Revenue has accepted the learned ITAT's decision in some of the AYs, we also find no merit in the Revenue's challenge to the amortisation of premium paid in respect of the Held to Maturity (HTM) securities. The securities under HTM category are those that are held till its redemption /maturity. Clearly, if any premium is paid for acquiring the said securities over and above the face value or the



redemption value of those securities, it would be apposite to amortize the same during the holding period. The market value of the fixed interest-bearing securities fluctuates on the basis of the market rate of interest. The differential amount between the coupon rate and the market rate is reflected by the premium or discount on which such securities are available.

16. Illustratively, the securities being a coupon rate which is lower than the market rate of interest would be available on discount while securities with a higher coupon rate would be available at a premium. We find no infirmity with the Assessee amortizing the premium paid on such securities over the holding period.

17. The fourth question relates to loss of ₹2,00,000/- claimed by the Assessee bank from shifting of securities from AFS (Available for Sale) / HFT (Held for Trading) to HTM (Held Till Maturity) portfolio. The AO disallowed the loss holding that transfer of securities from one portfolio to another is not a financial transaction and the loss was notional. The learned CIT(A) and the learned ITAT have accepted the Assessee's contention relying on decisions in Assessee's case for AY 2008-09.

18. Concededly, the said question is covered by the earlier decision of this court in ***Principal Commissioner of Income Tax-07 v. M/s Oriental Bank of Commerce: ITA No.306/2016*** decided by an order dated 11.05.2016, whereby this court declined to frame a question of law. The relevant extract of the said decision is set out below:-

“3. The ITAT found that the Assessee has been consistently reflecting the investment as stock-in-trade in its balance sheet. The ITAT has noted that the Assessee had in compliance with the direction of the Reserve



Bank of India (RBI) transferred SLR securities appreciating to Rs. 1664.32 crores from the 'available for sale' category to the 'held to maturity' category during the AY in question. This resulted in mark to market devaluation of Rs.205.43 crores which was debited to the P&L account. regarding maintaining a minimum amount of stock as reserve. The AO disallowed this by terming it as a notional and not a real loss. The ITAT disagreed and reversed the AO in light of the legal position explained in the decision of the High Court of Karnataka in **Karnataka Bank Ltd. v. Assistant Commissioner of Income Tax [2013] 356 ITR 549 (Kar.)** and the decisions High Court of Bombay in **Commissioner of Income Tax v. Bank of Baroda [2003] 262 ITR 334 (Bom)** and **Commissioner of Income Tax v. HDFC Bank Ltd. [2014] 368 ITR 377 (Bom)**. The ITAT has noted that the above decisions referred to the decisions of the Supreme Court in **United Commercial Bank v. Commissioner of Income Tax [1999] 240 ITR 355 (SC)** and **Southern Technologies Ltd v. The Joint Commissioner of Income Tax [2010] 320 ITR 577 (SC)**.

4. However, Mr. Shivpuri, learned Senior standing counsel appearing for the Revenue, seeks to place reliance on another decision of High Court of Karnataka in **Commissioner of Income Tax v. ING VYSYA Bank Ltd. [2013] 356 ITR 532 (Kar.)** where, in the facts of that case it was held that where the Assessee invested in securities for the purpose of complying with RBI instructions, such investments could not be termed as investment in the form of security ready for sale.

5. The Court is not persuaded to concur with the view expressed in **ING VYSYA Bank Ltd. (supra)** which appears to have been decided in the peculiar facts of that case. The Court prefers to adopt the reasoning in the decision the Karnataka High Court in **Karnataka Bank Ltd. (supra)** and the Bombay High Court in **HDFC Bank Ltd. (supra)**. The Court accordingly declines to frame a question on this issue.”

19. The fifth question relates to Section 45B of the Act qua contributions made by the Assessee to ‘PNB Employees’ Pension Fund’. The AO rejected the said claim as the same was made on the basis of actuarial valuation while the government notification permitted only annual contribution. Noting that the Banking Companies Undertaking Act, 1970 had enjoined entities such as the Assessee to create pension trusts and following the order



passed in the Assessee's case for AY 2008-09, the learned CIT(A) deleted the addition. The learned ITAT confirmed the learned CIT(A)'s decision holding that the contribution had actually been paid by the Assessee and that it was a normal business expense.

20. The learned counsel also drew our attention to order dated 22.03.2024 passed by this Court in ITA No.960/2018 and ITA No.540/2023 and pointed out that no question of law was admitted on the aforesaid issue in those appeals.

21. There is no dispute that the contributions made by the Assessee were in respect of the Employees' Pension Fund (EPF) and wholly and exclusively related to its business. Additionally, the quantum of contributions, does not in any manner, detract from the nature of the said payments. No substantial question of law arises in this regard as well.

22. The sixth question relates to goodwill arising from amalgamation of the erstwhile Nedungadi bank with the Assessee bank and is stated to be a recurring issue from AY 2003-04 onwards. The learned CIT(A) deleted the addition holding that the very same treatment was required to be given in the present year also. ITAT confirmed the relief granted by the learned CIT(A) relying on the decision of the coordinate bench rendered in ITA No.2469/Del/2011 for AY 2007-08.

23. We find that the same question was projected by the Revenue before this court in ITA No.960/2018 (AY 2006-07) and ITA No.540/2023 (AY 2014-15). ITA No.960/2018 was dismissed and the question as projected was not entertained in ITA No.540/2023. The learned counsel for the



Assessee points out that the said issue is also covered by the judgment of this court in *PCIT v. Eltrek SGS (P) Ltd.: (2023) 457 ITR 733* and by Supreme Court's judgment in *CIT v. Smifs Securities Ltd.: (2012) 348 ITR 302 (SC)*.

24. No substantial question of law arises in the appeal. The appeal is, accordingly, dismissed.

VIBHU BAKHRU, ACJ

TUSHAR RAO GEDELA, J

DECEMBER 06, 2024

RK/gsr

Click here to check corrigendum, if any