IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C" MUMBAI

BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 3394/MUM/2019
Assessment Year: 2015-16

IDBI Bank Ltd., 22nd Floor, IDBI Tower, WTC Complex, Cuffe Parade, Mumbai-400 005. **PAN No. AABCI 8842 G**	**Vs.**	DCIT – LTU (2), 29th Floor, Centre No. 1, World Trade Centre, Cuffe Parade, Mumbai-400 005
Appellant		**Respondent**

ITA No. 3849/MUM/2019
Assessment Year: 2015-16

DCIT – LTU (2), 29th Floor, Centre No. 1, World Trade Centre, Cuffe Parade, Mumbai-400 005	**Vs.**	IDBI Bank Ltd., 22nd Floor, IDBI Tower, WTC Complex, Cuffe Parade, Mumbai-400 005. **PAN No. AABCI 8842 G**
Appellant		**Respondent**

Assessee by	:	Mr. C. Naresh, AR
Revenue by	:	Mr. V. Sreekar, DR
Date of Hearing	:	18/11/2020
Date of Pronouncement	:	09/02/2021

ORDER

PER N.K. PRADHAN, A.M.

The captioned cross appeals-one filed by the Assessee and the other by the Revenue-are directed against the order of the Commissioner of Income Tax (Appeals)-2, Mumbai [in short 'CIT(A)'] and arise out of order u/s 143(3) of the

Income Tax Act, 1961 ('the Act'). As similar issues are involved, we are proceeding to dispose off these appeals by a consolidated order for the sake of convenience.

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2. Industrial Development Bank of India was set up under the Industrial Development Bank of India Act, 1964, as a premier financial institution of the country. This Act was repealed in the previous year relevant to the AY 2005-06 and the entire business was vested in Industrial Development of India Ltd. and was converted into Banking Company. The name was later changed to IDBI Bank Ltd. (the assessee-Bank).

In the return of income filed for the impugned assessment year, the assessee declared total income of Rs.2840,48,33,580/- under normal provision and Rs.3454,28,25,010/- u/s 115JB of the Act.

3. <u>The 1st ground of appeal</u>

> The Ld. CIT(A) erred in not granting relief on disallowance under Rule 8D(iii) based on decision of Hon'ble Gujarat High Court in case of Sintex Industries Ltd. (82 taxmann.com 171) by wrongly distinguishing the case even when the facts of the case are squarely applicable to appellant.

During the year under consideration, the assessee has received an amount of Rs.131,15,55,304/- as dividend from shares of financial institutions, companies, subscription to Venture/Mutual Funds and on investment in shares in secondary market. It claimed this income as exempt u/s 10(34) of the Act. Also during the year, the assessee received interest

income of Rs.84,68,39,275/- from investment in tax-free bonds, which it claimed as exempt u/s 10(15) of the Act.

During the course of assessment proceedings, the AO noted that the assessee has *suo motu* disallowed an amount of Rs.2,22,63,226/- as expenses incurred towards exempt income and reduced the same in the computation of income. As the basis of disallowance of the above amount for earning exempt income during the year was not submitted, the AO raised objections to the correctness of the claim of expenditure made by the assessee and accordingly invoked the provisions of Rule 8D. As mentioned in the assessment order, the AO *vide* ordersheet noting dated 22.11.2017 asked the assessee to furnish details of dividend income earned and expenses incurred as per provisions of section 14A r.w. Rule 8D of the Income Tax Rules, 1962 (the Rules). In response to it, the assessee filed a reply dated 07.12.2017 which is extracted at para 3.3 of the assessment order. However, the AO was not convinced with the said reply and following the decision of the Hon'ble Bombay High Court in *Godrej & Boyce v. DCIT* (328 ITR 81) computed the disallowance u/s 14A r.w. Rule 8D at Rs.279,23,59,048/-; the break-up being Rs.259,40,87,271/- under Rule 8D(2)(ii) and Rs.19,82,71,777/- under Rule 8D(2)(iii). As the assessee had added back Rs.2,22,63,226/- towards expenses incurred for earning exempt income, the AO made an addition of the balance amount of Rs.2,77,00,95,822/-.

The dispute in the instant appeal is the disallowance of Rs.19,82,71,777/- made by the AO under Rule 8D(2)(iii).

4. In appeal, the Ld. CIT(A) vide order dated 25.03.2019 held that :

"4.5.3. I find that the appellant company is a public sector bank and has a past history of being an industrial development bank. It has been noted by the AO that major part of its investment was made as a part of assistance to industrial concerns along with various other facilities like loans, lease, finance, debentures etc. making investment in equity shares and securities as a part of overall package. Such investments in equity shares and preference shares of the industrial concerns would not be in the nature of stock-in-trade and the expenditure in relation to the exempt income arising from such investments will have to be considered for disallowance under section 14A. In this regard, it is noted from the above cited paras in the case of Maxopp Investment Ltd. that where the shares are held as stock-in-trade by the bank, the disallowance under Rule 8D in respect of expenditure in relation to the exempt income has not been approved. However, it has been held that in the case like Maxopp Investment Ltd., the assessee would continue to hold those shares as it wants to retain control over the investee company and in that case, whenever dividend is declared by the investee company that would necessarily be earned by the assessee and the assessee alone. I find that the appellant, even at the time of investing into those shares, like Maxopp Investment Ltd. knew that it may generate dividend income as well and as and when such dividend income is generated that would be earned by it. Therefore, I am of the considered opinion that while computing the disallowance u/s. 14A read with Rule 8D(2)(iii), investments made as a part of assistance to industrial undertaking, by way of investment in equity shares and preference shares, should be considered and only those investments which are clearly in the nature of stock-in-trade i.e. purchased for trading purpose should be excluded. Further, only those of such investments, exempt income from which have been earned during the year have to be considered, in light of the decision in the case of Cheminvest Ltd. vs. Commissioner of Income-tax-IV [2015] 61 taxmann.com 118 (Delhi).

In view of the discussion, the AO is directed to verify the revised computation made in respect of disallowance under Rule 8D(2)(iii) at Rs.15,35,60,175/- and allow appropriate relief to the appellant."

5. Before us, the Ld. counsel for the assessee submits that there was no objective satisfaction recorded by the AO as to why the computation mechanism provided under Rule 8D(2) of the Rules would come into operation, having regard to the accounts of the assessee. Further stating that in the assessment order, the AO has stated that no working for *suo motu* disallowance was submitted which was factually incorrect as no disallowance was made by the assessee; subsequently in order u/s 154 dated 29.03.2018, the AO stated that since no disallowance was made by the assessee, he is not satisfied with regard to claim of the assessee that no disallowance is warranted. In this regard, the Ld. counsel relies on the order of the Tribunal in the case of *Central Bank of India* (ITA No. 3739/Mum/2018), where on a similar circumstances it was held that no disallowance is warranted.

6. On the other hand, the Ld. Departmental Representative (DR) refers to the order of the Ld. CIT(A) and explains that the assessee has *suo motu* disallowed an amount of Rs.222,63,226/- which is 1% of the exempt income from dividend and interest, as expense incurred towards exempt income and reduced the same in the computation of income ; the AO was not satisfied regarding the basis of this disallowance and correctness of such claim and invoked Rule 8D. Further, it is stated by the Ld. DR that the AO has passed an order u/s 154 dated 29.03.2018 with the finding that although the assessee had made a *suo motu* disallowance of Rs.222,63,226/- in the computation of total income, the same is actually on account of income from venture capital funds offered to tax on accrual basis as per Form 64 and not on account of disallowance u/s 14A, which according to the Tax Audit Report was taken as Nil during the impugned assessment year.

Further relying on the order of the Ld. CIT(A), the Ld. DR submits that considering the fact that the assessee had been making a disallowance @ 1% of the exempt income u/s 14A in the preceding assessment years and since there is no change in the facts of the case, the claim of no disallowance u/s 14A in the impugned assessment year is not found to be correct. Thus it is stated by him that considering the size of the investments as also the exempt income earned, the related expenditure by way of involvement of manpower and the establishment expenditure has to be considered for disallowance u/s 14A, the AO has rightly recorded the satisfaction before making the said disallowance.

7. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

The assessment u/s 143(3) was passed by the AO on 26.12.2017. The reasons recorded by the AO before making disallowance u/s 14A r.w. Rule 8D is contained in para 3.2 of the said order and the same is produced below :

> "3.2 On further perusal of the details furnished by the assessee company, it is also seen that the assessee company has *suo-motu* disallowed an amount of Rs.2,22,63,226/- as expenses been incurred towards the exempt income and reduced the same in the computation of income. However, the basis of disallowance of Rs.2,22,63,226/- for earning the exempt income during is not submitted by the assessee company. Hence, I am not satisfied with regard to correctness of the claim of expenditure made by the assessee. Therefore the provisions of Rule 8D of Income Tax Rules are being invoked. The assessee *vide* order sheet noting dated 22.11.2017 was asked to furnish details of dividend income earned and expenses incurred as per provisions of section 14A and Rule 8D on earning this income.
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> * * * * * * * * * * * * * * * *

3.5 The submissions made by the assessee as well as reliance placed have been carefully considered. Similar issue was also adjudicated and decided against the assessee in the assessment order for earlier Assessment Years. Since there is no change in the facts in the year under consideration, following the reasoning given in the order u/s 143(3) for the earlier years, the same is not acceptable and it is held that the income has to be exempted after allowing expenditure incurred to earn such income. Consequently exemption u/s 10 has to be allowed only on the net dividend/interest income. Further, the assessee's contention that the investments were made out of own fund is also not correct."

The AO has passed a rectification order u/s 154 of the Act dated 29.03.2018, stating the following :

"9. Disallowance u/s 14A of the Act: As per Para 3.2 of Order u/s 143(3) dated 26.12.2017, mentioned that "the assessee company has *suo-motu* disallowed an amount of Rs.2,22,63,226/- as expenses has been incurred towards the exempt income and reduced the same in the computation of income. However, assessee has not disallowed the said amount as expenses towards the exempt income. The Tax Auditor also mentioned in Tax Audit report "As informed by the management and based on our verifications, the own funds of the Bank comprising of share capital, share premium and reserves exceed the amount invested in the investments yielding tax free income. Hence, amount inadmissible in terms of section 14A in respect of the expenditure incurred in relation to income which does not form part of the total income is NIL for F.Y.: 2014-15. The Bank has been disallowing 1% of the tax free income based on the past decisions in the Bank's own case till last year." The amount of Rs.2,22,63,226/-, is actually added back as Income from Venture Capital Funds Offered to tax on accrual basis as per Form 64. Further, in Para 3.10 of the said order, it is mentioned that "Assessee vide letter dated 07.11.2017 submitted that computation as per rule 8D is given in Annexure 9B of Tax Audit Report." In this regard, the submission date was made on 07.12.2017 and 11.12.2017. Regarding Rule 8D, Tax auditor confirmed that amount inadmissible in

terms of section 14A in respect of the expenditure incurred in relation to income which does not form part of the total income is NIL for F. Y.: 2014-15 in Tax Audit Report. Hence, the computation as per rule 8D is not given in the annexure of Tax Audit Report. Since this is a mistake apparent from record, it is humbly requested to delete the observations as the assessee is *suo moto* making a disallowance of Rs.2,22,63,226/-. As also submission by assessee itself computation as per Rule 8D.

9.1 On perusal of the submission of the assessee, it is found that the submission of the assessee is correct. Accordingly, Para no. 3 to 3.11 of the assessment order is rectified and replaced with the following paras:-

3. Disallowance u/s 14A of the Act:

3.1 On perusal of the return of income, it is observed that the assessee company has received an amount of Rs.131,15,55,304/- as dividend from shares of financial institutions, companies, subscription to Venture/Mutual Funds and on investment in shares in secondary market. The assessee has claimed this income as exempt u/s 10(34) of the Act. During the year, the assessee also received interest income of Rs.84,68,39,275/- from investment in tax free bonds, which has been claimed as exempt under section 10(15) of the Act.

3.2 On further perusal of the details furnished by the assessee company, it is seen that the assessee company has not disallowed any expenses u/s 14A of the Act in respect of exempt income earned during the year. Hence, I am not satisfied with regard to correctness of the non-disallowance of any expenditure by the assessee and hence provisions of Rule 8D of Income Tax Rules are being invoked. The assessee vide order sheet noting dated 22.11.2017 was asked to furnish details of dividend Income earned and expenses incurred as per provisions of section 14A and Rule 8D on earning this income."

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3.5 The submissions made by the assessee as well as reliance placed have been carefully considered. Similar issue was also adjudicated and decided against the assessee in the assessment order for earlier Assessment Years. Since there is no change in the facts in the year under consideration, following the reasoning given in the order u/s 143(3) for the earlier years, the same is not acceptable and it is held that the income has to be exempted after allowing expenditure incurred to earn such income. Consequently exemption u/s 10 has to be allowed only on the net dividend/interest income, Further, the assessee's contention that the investments were made out of own fund is also not correct."

7.1 In *Maxopp Investment Ltd. v. CIT* (2018) 91 taxmann.com 154 (SC), it is held that :

"41. Having regard to the language of Section 14A(2) of the Act, r.w. Rule 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 u/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."

In *Godrej & Boyce Manufacturing Company Ltd. v. DCIT* (2017) 81 taxmann.com 111 (SC), it is held that :

"37. We do not see how in the aforesaid fact situation a different view could have been taken for the Assessment Year 2002-2003. Sub-sections (2) and (3) of Section 14A of the Act read with Rule 8D of the Rules merely prescribe a formula for determination of expenditure incurred in relation to income which does not form part of the total income under the Act in a situation where the Assessing Officer is

not satisfied with the claim of the assessee. Whether such determination is to be made on application of the formula prescribed under Rule 8D or in the best judgment of the Assessing Officer, what the law postulates is the requirement of a satisfaction in the Assessing Officer that having regard to the accounts of the assessee, as placed before him, it is not possible to generate the requisite satisfaction with regard to the correctness of the claim of the assessee. It is only thereafter that the provisions of Section 14A(2) and (3) read with Rule 8D of the Rules or a best judgment determination, as earlier prevailing, would become applicable."

7.2 After the receipt of the reply dated 07.12.2017 and 11.12.2017 from the assessee , which is produced at para 3.3 and 3.4 of the assessment order dated 26.12.2017, the AO has recorded in para 3.5 that "The submissions made by the assessee as well as reliance placed have been carefully considered. Similar issue was also adjudicated and decided against the assessee in the assessment order for earlier Assessment Years. Since there is no change in the facts in the year under consideration, following the reasoning given in the order u/s 143(3) for the earlier years, the same is not acceptable and it is held that the income has to be exempted after allowing expenditure incurred to earn such income. Consequently exemption u/s 10 has to be allowed only on the net dividend/interest income. Further, the assessee's contention that the investments were made out of own fund is also not correct."

The present appeal is directed against the order of the Ld. CIT(A) and arises out of assessment passed by the AO u/s 143(3) dated 26.12.2017. It does not arise from the rectification order u/s 154 dated 29.03.2018 passed by the AO. We need to examine the satisfaction recorded in the assessment order dated 26.12.2017 and not in the rectification order dated 29.03.2018.

Thus it is crystal clear that in the instant case, the AO has not recorded any objective satisfaction as to why the computation mechanism provided in

Rule 8D(2) of the Rules would come into operation, having regard to the accounts of the assessee. To follow the reasons as recorded for earlier years, as done by the AO in the impugned assessment year, is definitely not an objective satisfaction. Therefore, following the ratio laid down in the above decisions of the Hon'ble Supreme Court, we set aside the order of the Ld. CIT(A) in respect of disallowance u/s 14A r.w. Rule 8D(2)(iii) and allow the 1st ground of appeal.

8. The 2nd ground of appeal

> The Ld. CIT(A) erred in confirming the disallowance of payment for non-compliance with RBI norms on customer service etc., treating the same as falling under Explanation-1 to section 37(1) without appreciating that the payment was only compensatory in nature.

It is noted by the AO that as per the Tax Audit Report, the assessee has claimed Rs.15,00,000/- on account of penalty imposed by RBI u/s 47A of the Banking Regulation Act, 1949 and Rs.94,200/- for non-compliance of guidelines on customer service, guidelines in respect of exchange of points and small de-nomination notes and mutilated notes. The AO considered that the payments were made on account of penalty ; the word 'penalty' is used for violation of law/procedural law under the concerned Act. Therefore, the AO made a disallowance of Rs.15,94,200/- and added it to the total income of the assessee.

9. In appeal, the Ld. CIT(A) referred to section 47A of the Banking Regulation Act, which reads as under :

> "Notwithstanding anything contained in section 46, if a contravention or default of the nature referred to in sub-section (3) or sub-section (4) of section 46, as the case may be, is made by a banking company, then, the Reserve Bank may impose on such banking company...
>
> Section 46(4)(i) of Banking Regulation Act states that - If any other provision of this Act is contravened or if any default is made in— (i) complying with any requirement of this Act or of any order, rule or direction made or condition imposed thereunder, or... such person shall be punishable with fine which may extend to...."

Accordingly, the Ld. CIT(A) held that the penalty levied by RBI is penal in nature and not compensatory because the penalties are held to be for default in respect of provisions of law i.e. Banking Regulation Act for non-adherence to KYC norms and anti-money laundering provisions and are thus found to be against public policy. Relying on the order of the ITAT, Delhi in the case of *ANZ Grindlays Bank v. DCIT* (2004) 88ITD 53 (Delhi), he upheld the addition of Rs.15,94,200/- made by the AO.

10. Before us, the Ld. counsel submits that the amount levied was not in nature of any purpose which is an offence or which is prohibited by law but was only for non-sharing of information on loan sanctioned to other banks and non-adherence to currency chest guidelines and accordingly, the expenditure should have been allowed as deduction. In this regard, reliance is placed by him on the decision by the Hon'ble Bombay High Court in *CIT v. Stock & Bond Trading Company* (ITA No. 4117 of 2010) and the order of the Tribunal in *Bapunagar Mahila Co-operative Bank* (ITA No. 2423/Ahd/2010) and *Mangal Keshav Securities Ltd*. 46 ITR (Trib.) 458.

11. On the other hand, the Ld. DR refers to the decision in *ANZ Grindlays Bank* (supra) wherein it is held that-

> "The RBI directions/guidelines are statutory and violation of the same are akin to violation of statutory provisions. The Supreme Court in the case of Bank of India Finance Ltd. v. Custodian [1997] 10 SCC 488, has also held that the directions of the RBI are binding on the banks; such violations are punishable under the provisions of the Banking Regulation Act. Hence, any payment in violation of the RBI directions is not allowable as deduction under section 37. Explanation to section 37(1) makes it clear beyond doubt that any expenditure prohibited by law cannot be allowed as deduction under section 37. [Para 33]"

Further relying on section 47A of the Banking Regulation Act and the above decision, it is stated by the Ld. DR that the order passed by the Ld. CIT(A) is based on proper appreciation of facts and position of law and therefore the same should be affirmed.

12. We have heard the rival submissions and perused the relevant materials on record. In *M/s Stock & Bond Trading Company* (supra) one of the questions was whether the Tribunal was justified in deleting the additions made by the AO under provisions to section 37(1) being penalty imposed by the National Stock Exchange on the assessee. The Hon'ble High Court held that :

> "3 As regards the second question is concerned, the finding of fact recorded by the CIT(A) and upheld by the ITAT is that the payments made by the Assessee to the Stock Exchange for violation of their regulation are not on account of an offence or which is prohibited by law. Hence, the invocation of explanation to section 37 of the Income Tax Act, 1961 is not justified. In our opinion, in the facts and circumstances of the present case, no fault can be found with the decision of the ITAT. Accordingly, the second question cannot be entertained."

In *Bapunagar Mahila Co-operative Bank Ltd*. (supra), the Tribunal held that :

> "20. We come to the assessee's first substantive ground. The RBI imposed a penalty of Rs.5 lacs (supra) u/s. 47A (1)(b) of the Banking Regulation Act,1947 alleging violation of KYC norms. Both the authorities below hold that a penalty imposed does not give rise to any corresponding revenue expenditure being penal in nature.
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> 21. It has come on record that this penalty arises from the assessee's action in opening 250 FDRs (supra) already dealt in Revenue's appeal. The question that arises for our consideration is as to whether the word 'penalty' results in a blanket disallowance or facts involved therein still need to be examined. The hon'ble Kerala high court (2004) 265 ITR 177 CIT v/s. Catholic Syrian Bank holds that an important test in such a case is as to whether the penalty for non compliance entails compensatory or penal consequences. And also that if any criminal liability or prosecution is provided, a levy is penal in nature. Section 46 r.w.s. 47A(1)(b) of the Banking Regulation law does not stipulate any such criminal liability. We follow the aforestated case law in these facts and direct the assessing authority to allow the assessee's claim of Rs.5 lacs as revenue expenditure."

In *Mangal Keshav Securities Ltd*. (supra), the assessee was engaged in the business of share/stock broking. It paid a sum of fine/penalty to stock exchange for non-maintenance of KYC forms etc. Said penalty was disallowed by the AO by invoking Explanation 1 to section 37. The Tribunal held that :

> "The assessee-company is engaged into stock broking activities and also in financial services which involves substantial compliance requirements with various regulatory authorities, e.g., BSE, NSE, CDSL, NSDL and SEBI, etc. In the regular course of the business of the assessee-company, certain procedural non-compliance are not unusual, for which the assessee is required to pay some fines or penalties. These routine fines or penalties are 'compensatory' in nature; they are not punitive.

> These fines are generally levied to ensure procedural compliances by the concerned persons. Only those payments, which have been made by the assessee for any purpose which is an 'offence' or which is 'prohibited by law', shall alone would be hit by the Explanation to section 37. Thus impugned amount of penalty was allowable as deduction."

12.1 In the instant case, as recorded by the AO the assessee has claimed expenses on account of penalty of Rs.15,00,000/- imposed by the RBI u/s 47A of the Banking Regulation Act, 1949 and Rs.94,200/- for non-compliance of guidelines on customer service, guidelines in respect of exchange of coins and small de-nomination notes and mutilated notes. The ratio laid down in the decisions mentioned at para 12 is squarely applicable to the instant case instead of the decision in *ANZ Grindlays Bank* (supra) relied on by the Ld. DR. Therefore, following the decisions mentioned at para 12 above, we delete the disallowance of Rs.15,94,200/- levied by the AO. Accordingly, the 2nd ground of appeal is allowed.

13. <u>The 3rd ground of appeal</u>

> The Ld. CIT (A) erred in confirming order of AO in adding the tax on non-monetary perquisite in computing book profits u/s 115JB without appreciating that the amount paid represents employee cost and not tax in the hands of appellant.

The assessee has computed book profit u/s 115JB at Rs.3454,28,24,511/- and tax liability under MAT provisions was shown at Rs.724,03,48,732/- including surcharge and education cess. During the course of assessment proceedings, the AO noticed that the assessee, while computing income under normal provisions of the Act, has added back Rs.12,16,10,651/- being taxes on non-monetary perquisites to employees u/s 40(a)(v) of the Act. However,

while computing income u/s 115JB, the same has not been added back to book profits. The AO filed a reply dated 22.11.2017 on the above before the AO. However, the AO was not convinced with the said reply on the ground that Explanation u/s 115JB specifically provides for increase in book profit by the amount of income tax paid, payable or provision made thereof and section 40(a)(v) clearly provides that the taxes paid by the employer on perquisites to the employee is not deductible from the income of the employer. As per the AO this element of tax on perquisites is also not taxable in the hand of the employees u/s 10(10CC) of the Act and hence the same cannot be construed as akin to TDS/fringe benefit tax. On the basis of the above reasons, the AO added back Rs.12,16,10,651/- to the MAT income of the assessee computed u/s 115JB of the Act.

14. In appeal, the Ld. CIT(A) held that :

> "7.3. I have considered the AO's order and submission made by the appellant. I find that Explanation 1(a) below section 115JB provides that the book profit has to be increased by the amount of income tax paid or payable and the provision therefor. The appellant company has made the payment of the tax on the income in the nature of perquisite to its employee and its nature is that of income tax. The tax has been paid by the employer by its own choice. The contention of the appellant that Explanation 1 to sub-section (1) of Section 115JB refers to the Assessee's own income-tax liability is not found to be Justified since the clause (a) to Explanation 1 of section 115JB refers to 'the amount of the income tax paid or payable' and it doesn't refer to 'own income tax liability'. However, it is also noted that the said income tax paid by the appellant is in fact the liability of the appellant since it has agreed to pay such tax. Therefore, the action of the AO in making the addition of tax on non-monetary perquisites provided to the employees amounting to Rs.12,16,10,651/- to the book profit u/s. 115JB is upheld."

15. Before us, the Ld. counsel submits that the same issue has been decided in favour of the assessee by the ITAT Mumbai in the case of *Rashtriya Chemicals & Fertilizers Ltd. v. CIT* (91 taxmann.com 104).

On the other hand, the Ld. DR relies supports the order passed by the Ld. CIT(A).

16. We have heard the rival submissions and perused the relevant materials on record. Similar issue arose before the Tribunal in *Rashtriya Chemicals & Fertilizers Ltd.* (supra). The Tribunal held that taxes borne by the assessee on non-monetary perquisites provided to employees forms part of *Employee Benefit* cost and akin to *Fringe Benefit Tax* since they are certainly not 'below the line' items, since the same are expressly disallowed u/s 40(a)(v), the same do not constitute Income Tax for the assessee in terms of Explanation-2 to section 115JB ; therefore, without there being any corresponding amendment in the definition of Income Tax as provided in *Explanation-2* to section 115JB, *Fringe Benefit Tax* was not required to be added back while arriving at *Book Profits* u/s 115JB of the Act. Further, the Tribunal held that :

> "Computation of book profits under section 115JB has to be made in the manner as provided in Explanation-1 to section 115JB. The Minimum Alternate Tax [MAT] provisions as contained in section 115JB, as per well-settled law, are a complete code in itself and creates a deeming fiction which is to be construed strictly and therefore, whatever computations/adjustments are to be made, they are to be made strictly in accordance with the provisions provided in the code itself. The clause (a) of Explanation-1 envisages add-back of the amount of Income Tax paid or payable and the provision therefor while arriving at book profits. Further, in terms of Explanation-2 to section 115JB, the amount of Income Tax specifically includes the following components any tax on distributed profits under section 115-O or on

distributed income under section 115R; any interest charged under this Act; surcharge, if any, as levied by the Central Acts from time to time; Education Cess on income-tax, if any, as levied by the Central Acts from time to time; and Secondary and Higher Education Cess on income-tax, if any, as levied by the Central Acts from time to time."

16.1 Facts being identical, following the above order of the Tribunal we set aside the order of the Ld. CIT(A) and delete the addition of Rs.12,16,10,651/- made by the AO of tax on non-monetary perquisites provided to the employees to the book profit u/s 115JB of the Act. Thus the 3rd ground of appeal is allowed.

17. The assessee has filed an additional ground stating that the amount of education cess and higher & secondary education cess is not tax as covered u/s 40(a)(ii) and accordingly allowable as deduction in computing the income from business or profession. The above additional ground is squarely covered in favour of the assessee by the decision of the Hon'ble Bombay High Court in the case of *Sesa Goa Ltd*. (423 ITR 426) and Hon'ble Rajasthan High Court in the case of *Chambal Fertilizers & Chemicals Ltd*. (ITA No. 52 of 2018). Following the above decisions, we admit and allow the additional ground of appeal filed by the assessee.

18. In the result, the appeal filed by the assessee is allowed.

ITA No. 3849/MUM/2019
(*Revenue's Appeal*)

19. The 1st ground of appeal

Whether, on the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in restricting the disallowance made u/s. 14A r.w.r. 8D(2)(iii) of the I.T. Rules,

in view of the Mumbai ITAT's decision in the case of ACIT vs. Citicorp Finance (India) Ltd [108 ITD 457] [MUM]?

Whether, on the facts and in the circumstances of the case and in law the Ld. CIT(A) erred in deleting the disallowance made u/s 14A r.w.r. 8D to earn dividend income in computing Book Profit u/s 115JB of the Act?

20. As mentioned earlier, the Ld. CIT(A) while adjudicating the disallowance made by the AO u/s 14A r.w. Rule 8D(2)(iii) has held that while computing the disallowance u/s 14A r.w. Rule 8D(2)(iii), investments made as a part of assistance to industrial undertakings, by way of investment in equity shares and preference shares should be considered and only those investments which are clearly in the nature of stock-in-trade i.e. purchased for trading purpose should be excluded. Also it is held by him that only those of such investments, exempt income from which has been earned during the year is to be considered in the light of the decision in the case of *Cheminvest Ltd. v. CIT* (2015) 61 taxmann.com 118 (Delhi). Accordingly, the Ld. CIT(A) directed the AO to verify the revised computation made in respect of disallowance under Rule 8D(2)(iii) and allow appropriate relief to the assessee.

21. Before us, the Ld. DR submits that the order passed by the AO.

On the other hand, the counsel submits that the appeal filed by the Revenue does not survive as the AO has not recorded any objective satisfaction as to why the computation mechanism provided in Rule 8D(2) of the Rules would come into operation, having regards to the accounts of the assessee. In this regard, reliance is placed by him on the order of the Tribunal in the case of *Central Bank of India* (supra).

22. As we have set aside the order of the Ld. CIT(A) in respect of disallowance made by the AO u/s 14A r.w. Rule 8D(2)(iii) and allowed the 1st ground of appeal of the assessee *vide* para 7.2 above, the above ground of appeal does not survive.

23. The related issue connected with the above ground of appeal relates to the order of the Ld. CIT (A) in respect of disallowance made u/s 14A r.w. Rule 8D to earn dividend income in computing book profit u/s 115JB of the Act.

We find that similar issue arose before the Hon'ble Bombay High Court in the case of *CIT v. M/s Bengal Finance & Investments Pvt. Ltd*. (ITA No. 337 of 2013). The question of law before the High Court *inter alia* was the following :

> "(b) Whether on the facts and in the circumstances of the case, and in law the ITAT is justified in deleting the addition of Rs.78,84,387/- under clause (f) of Explanation 1 to Section 115JB relying upon the decision in the case of Goetze (India) Ltd. v/s. CIT (2009) 32 SOT 101 (Dei), which has been followed by ITAT, Mumbai in the cases referred to in para 5 of the impugned order without appreciating that the above decision in the case of Goetze (India) Ltd. was rendered by the ITAT, Delhi Bench on completely distinguishable set of facts, peculiar to the said case?"

The Hon'ble High Court held that :

> "4 So far as Question (b) is concerned, the impugned order of the Tribunal followed its decision in M/s. Essar Teleholdings Ltd. v/s. DCIT in ITA No. 3850/Mum/2010 to hold that an amount disallowed under Section 14A of the Act cannot be added to arrive at book profit for purposes of Section 115JB of the Act. The Revenue's Appeal against the order of the Tribunal in M/s. Essar Teleholdings (supra) was dismissed by this Court in Income Tax Appeal No.438 of 2012 rendered on 7th August, 2014. In view of the above, question (b) does not raise any substantial question of law."

24. Facts being identical, we follow the above order of the Hon'ble Bombay High Court and confirm the order of the Ld. CIT(A). Thus the 1st ground of appeal is dismissed.

25. <u>The 2nd ground of appeal</u>

> Whether, on the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in deleting the disallowance of Rs.99,30,30,984/- towards year end provision for expenses on which TDS was not deducted, when Section 40(a)(ia) of the Act clearly warrants the disallowance of such sum on which TDS is not deducted?
> Whether, on the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in ignoring the decision of Hon'ble ITAT, Bangalore in the case of IBM India Pvt. Ltd. (ITA No. 305/Bang./2015), wherein the Tribunal held that it is clear from the statutory provision that the liability to deduct tax at source exists when the amount is credited to a 'suspense account' or 'any other account' by whatever name called which will also include a 'provision' created in the books of accounts?

26. As per the Tax Audit Report, the assessee has made year end provision of expenses on which tax has not been deducted. In response to a query raised by the AO, the assessee filed a reply dated 29.11.2017 which is extracted by the AO at para 4.1 of the assessment order. However, the AO was not convinced with the said reply of the assessee mainly on the ground that provisions of the Act pertaining to deduction of tax (as enumerated in Chapter XVII-B) requires that the payee should deduct tax at source at the time of payment or credit to the account of payee, whichever is earlier ; further it also provides that if the relevant amount is credited to a 'suspense account' or 'any other account' by whatever name called, even then it calls for deduction of tax at source. Relying on the order of the Tribunal in the case of *IBM India Pvt. Ltd*. [TS-305-ITAT-2015 (Bang.)], wherein the Tribunal has held that it is clear from the statutory

provisions that the liability to deduct tax at source exists when the amount is credited to a 'suspense account or 'any other account' by whatever name called, which will also include a 'provision' credited in the books of accounts, the AO made an addition of Rs.99,33,30,984/-.

27. In appeal, the Ld. CIT(A) deleted the above addition by following the order of the Tribunal in the case of *Pfizer Ltd. v. ITO* (2012) 28 taxmann.com 17 (Mum). Also relying on the judgment of the Hon'ble Supreme Court in the case of *Bharat Earth Movers v. CIT* (2000) 112 Taxman 61 (SC), wherein it is held that the provisions in respect of business liability which has arisen during the year and which can be estimated with fair degree of certainty are to be allowed as a deduction u/s 37 of the Act, the Ld. CIT(A) deleted the disallowance of Rs.99,30,30,984/- made by the AO.

28. The Ld. DR submits that the Ld. CIT(A) should not have ignored the order of the Tribunal in the case of *IBM India Pvt. Ltd*. (supra) wherein the Tribunal has held that the liability to deduct tax at source exists when the amount is credited to a 'suspense account' or 'any other account' by whatever name called which will also include a 'provision' credited in the books of account.

On the other hand, the Ld. counsel submits that the above issue has been decided in favour of the Bank by the Tribunal in assessee's own case for AYs 2008-09 (ITA No. 3423/Mum/2018), 2011-12 (ITA No. 3424/Mum/2018), 2012-13 (ITA No. 3425/Mum/2018) and 2013-14 (ITA No. 3426/Mum/2018).

29. We have heard the rival submissions and perused the relevant materials on record. In the instant case, the assessee *vide* reply dated 29.11.2017 has stated before the AO that as per Tax Audit report for AY 2015-16, on the year

end provision for expenses of Rs.99,33,30,984/- for which bills were not received and which are reversible in the subsequent years upon receipt of final bills, no tax at source was deducted. Further, relying on various orders of the Tribunals mentioned at para 4.1 of the assessment order, it was stated by the assessee that :

> "since the payee is not identifiable at the time of making of provision and further the entire provision has been written back in the next year and the actual amounts paid/credited were subjected to TDS as and when liability was crystallized or the payment were made."

At this moment we discuss here the judgment of the Hon'ble Gujarat High Court in *PCIT v. Sanghi Infrastructure Ltd*. (R/TAX Appeal no. 404 of 2018). During the Assessment Year (AY) 2009-10, the taxpayer made provision for expenses under the head 'repairs and maintenance' amounting to Rs. 6 million on which tax was not deducted at source. The taxpayer also made provision for 'operation and maintenance charges' amounting to Rs.7 million on which tax was not deducted at source. The Assessing Officer observed that these expenditures were a contingent liability and the same is not allowed under Section 37(1) of the Act. Further, no tax was deducted at the time of credit of expenses and therefore, the said provisions were disallowed under Section 40(a)(ia) of the Act. The taxpayer claimed that these provisions were part of the block provision related to unascertained liabilities and tax on the same had been deducted in the following year on submission of bills. The CIT(A) deleted the additions and held that bills in respect of the provision for expenses were not received during the year. The bills were received by the taxpayer in the next financial year and, therefore, the expenses could not be claimed on an actual basis. Since the taxpayer had a fair idea about the quantum of the

expenditure, which was pertaining to the current financial year as the bills were received before finalisation of the accounts, the taxpayer made a provision for those expenditures. Therefore, these provisions were made not on estimate basis but were made on the basis of actual estimation of the liability. The expenditure had already been incurred, but the exact quantification was not known before the end of the financial year. Therefore, it cannot be said that the provisions were in the nature of contingent liability. The contingent liability is dependent on a subsequent event, whereas in the present case, the expenditure had already been incurred. The CIT(A) observed that the taxpayer maintained the books of accounts on the mercantile basis and shown the income and expenditure on an accrual basis. Therefore, the provisions which were made on the basis of properly ascertaining the liability was to be allowed under Section 37(1) of the Act. Further, the taxpayer had only made the provisions in the account but had not credited the same in the accounts of concerned parties and, therefore, the provisions of Section 40(a)(ia) of the Act would not be applicable. The Tribunal upheld the order of the CIT(A). Aggrieved, the tax department filed an appeal before the High Court. The Hon'ble Gujarat High Court observed that the tax was not deducted on the aforesaid expenses since the same were a contingent liability and for which bills were not issued. Subsequently, as and when the final bills were received/issued, the tax was deducted. Accordingly, the High Court deleted the disallowance under Section 40(a)(ia) of the Act and upheld the orders of the Tribunal as well as the CIT(A).

Thus following the above decision of the Hon'ble Gujarat High Court and order of the Tribunal in assessee's own case for earlier year, we affirm the

order of the Ld. CIT(A) and dismiss the 2nd ground of appeal. However, following the above order of the Hon'ble Gujarat High Court, we direct the AO to examine and verify that "Subsequently, as and when the final bills were received/issued, the tax was deducted".

In the result, the appeal filed by the Revenue is dismissed.

30. To sum up, the appeal filed by the assessee is allowed, whereas the appeal filed by the Revenue is dismissed.

Order pronounced in the open Court on 09/02/2021.

Sd/-	Sd/-
(SAKTIJIT DEY)	(N.K. PRADHAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;
Dated: 09/02/2021
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Dy./Assistant Registrar)
ITAT, Mumbai