

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

INCOME TAX APPEAL NO. 1401 OF 2014

Commissioner of Income Tax-2
Mumbai

.. Appellant

v/s.

Ultra Tech Cement Ltd.

.. Respondent

Mr. Suresh Kumar for the appellant

Mr. J.D. Mistri, Senior Counsel a/w Mr. Atul Jasani for the respondent

**CORAM : M.S. SANKLECHA &
A.K. MENON, J.J.**

DATED : 14th FEBRUARY, 2017.

P.C.

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 28th February, 2014 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order dated 20th February, 2014 is a common order in respect of the Assessment Years 2007-08 and 2008-09. This appeal is in respect of Assessment Year 2008-09.

2. The Revenue urges the following re-framed questions of law for our consideration :-

- (i) *Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that the sales tax exemption benefit for the A.Y. 2008-09 is a capital receipt not liable to income tax?*
- (ii) *Whether the respondent assessee is eligible for deduction under Section 80-IA of the Income Tax Act by urging that the Rail system is not a profit center but a cost saving exercise undertaken in terms of sub-section (4) of Section 80IA?*
- (iii) *Whether on the facts and circumstances of the case, the Tribunal was correct in law, in setting aside the issue of 'interest expenses' to the file of the Assessing Officer and deleting the 'other expenses' towards earning exempt income, without appreciating the fact that the Assessing Officer had made the disallowance as per the provisions of Section 14A after noting his satisfaction that the disallowance needed to be done as per Rule 8D, the applicability of which is upheld by the Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. 328 ITR 81?*
- (iv) *Whether on the facts and circumstances of the case, the Tribunal was justified correct in law, in setting aside the issue of allowability of ESOP expenses to the file of the Assessing Officer for fresh consideration in the light of the findings of the Special Bench of the Hon'ble Tribunal in the case of Biocon Ltd. Vs. DCIT in ITA No. 368/Bang/2010 ?*
- (v) *Whether on the facts and circumstances of the case, the Tribunal was correct in law, in holding that the receipt from Certified Emission Reduction (CER) generated out of capital projects registered with United Nations Framework Conversation*

of Climate Change (UNFCCC), amounting to Rs.7.64 crore, was a capital receipt ?

3. Regarding question no.(iii) :-

(a) The impugned order of the Tribunal partly allowed the respondent assessee's appeal in respect of the dis-allowance made by the Assessing Officer under Section 14A of the Act r/w Rule 8D of the Income Tax Rules (Rules).

(b) In its Return of Income for A.Y. 2008-09, the respondent assessee had on its own disallowed an expenditure of Rs.50,15,284/- under Section 14A of the Act i.e. expenditure incurred to earn exempt income. However, the Assessing Officer after holding that he is not satisfied with the correctness of the disallowance of expenditure made by the respondent assessee applied Rule 8D of the Rules and determined a further the dis-allowance of Rs.4.03 crores. Therefore, the disallowance in the aggregate was Rs.4.53 crores under Section 14A of the Act in the assessment order dated 28th February, 2011.

(c) Being aggrieved, the respondent assessee carried the issue in appeal to the Commissioner of Income Tax (Appeals) [CIT(A)]. By an order dated 21st December, 2011, the CIT(A) upheld the order of the Assessing Officer holding that the Assessing Officer had recorded his non-satisfaction with the dis-allowance made by the respondent

assessee under Section 14A of the Act. Thus, according to the CIT(A), the Assessing Officer has rightly applied Rule 8D of the Rules to disallow the expenditure in the aggregate of Rs.4.53 crores under Section 14A of the Act.

(d) Being aggrieved, the respondent assessee carried the issue in appeal to the Tribunal. The impugned order records the fact that for the subject assessment year unlike for the earlier Assessment Year 2007-08, Rule 8D of the Rules would be applicable subject to Assessing Officer not being satisfied with the dis-allowance made under Section 14A of the Act by the respondent assessee, with reasons in support. However, the impugned order records the fact that the Assessing Officer did not in his order give any reasons for his non-satisfaction with the disallowance claimed. Nevertheless, the impugned order after recording the fact that for the Assessment Year 2007-08 in respect of the same respondent assessee, it had directed the Assessing Officer to verify whether the investment made in exempted units were out of its own funds or out of borrowed capital and then decide the proportionate interest to be dis-allowed, followed the same for the subject Assessment Year. Thus, the impugned order of the Tribunal restored the issue so far as dis-allowance of interest is concerned to the Assessing Officer to determine the extent to which the investments in

tax free units were made out of borrowed funds or out of its own funds, to the Assessing Officer in the subject assessment year. So far as disallowance of other expenses by the respondent assessee is concerned, the Tribunal records its satisfaction with it and holds no further disallowance is called for.

4. Mr. Suresh Kumar, learned Counsel appearing for the Revenue submits that the impugned order of the Tribunal in correctly proceeds on the basis that the Assessing Officer has not recorded his non-satisfaction with the claim of dis-allowance made by the respondent assessee. In support, he invites our attention to paragraph 6.4 of the order dated 28th February, 2011 of the Assessing Officer wherein the Assessing Officer records as under :-

“6.4 Under these circumstances, and having regards to the accounts of assessee, I am not satisfied with the correctness of the claim of assessee that only expenditure upto Rs.50,15,284/- has been incurred for earning exempt income.”

In the above view, it is submitted on behalf of the Revenue that the dis-allowance of expenditure under Section 14A of the Act on application of Rule 8D of the Rules by the Assessing Officer need not have been disturbed.

5. It is undisputed position before us that for the subject assessment year, Rule 8D of the Rules would be applicable in view of the decision of this Court in **Godrej and Boyce Manufacturing Co. Ltd. Vs. DCIT, 328 ITR 81**. However, we further note that the non-satisfaction of the Assessing Officer with regard to the dis-allowance of expenditure done by the respondent assessee has to be an objective satisfaction which entails recording of reasons as held by this Court in Godrej and Boyce (supra) in para 55 while recording summation of its conclusion as under :-

“(ix) The satisfaction envisaged by sub-section (2) of Section 14A is an objective satisfaction that has to be arrived at by the Assessing Officer having regard to the accounts of the assessee. The safeguard introduced by sub-section (2) of Section 14A for a fair and reasonable exercise of power by the Assessing Officer, conditioned as it is by the requirement of an objective satisfaction, must, therefore, be scrupulously observed. An objective satisfaction contemplates a notice to the assessee, an opportunity to the assessee to place on record all the relevant facts including his accounts and recording of reasons by the Assessing Officer in the event that he comes to the conclusion that he is not satisfied with the claim of the assessee;”

6. Thus, no fault can be found with the impugned order of the

Tribunal holding that the Assessing Officer should show fallacies in the computation of disallowance done by the respondent assessee. Thus, there is no reason to discard the disallowance done by the respondent assessee. Nevertheless, the impugned order of the Tribunal has restored the issue of disallowance of interest to the Assessing Officer to determine the extent of its tax free investments out of own funds and out of borrowed funds. So far as the claim with regard to the disallowance made in respect of the other expenditure (other than interest which has been restored to the Assessing Officer to find out the source of funds in the investment made), the impugned order has held it to be reasonable and calling for no further dis-allowance. This finding of the Tribunal is a finding of fact and the same has not been shown to us to be perverse in any manner. In the above view, the question as proposed does not give rise to any substantial question of law. Thus, not entertained.

7. The appeal is admitted on question nos. (i), (ii), (iv) and (v).

8. Registry is directed to communicate a copy of this order to the Tribunal. This would enable the Tribunal to keep the papers and proceedings relating to the present appeal available, to be produced

when sought for by the Court.

9. To be heard along with Income Tax Appeal No.1400 of 2014.

(A.K. MENON, J.)

(M.S. SANKLECHA, J.)