

आयकर अपीलीय अधिकरण "G" न्यायपीठ मुंबई में।

**IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI
BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.6259/Mum/2016

(निर्धारण वर्ष / Assessment Year : 2012-13)

M/s. Gold Seal Engineering Products P. Ltd., Gr. Floor, Gold Seal House, Village Road, Bhandup (W), Mumbai- 400078	बनाम/ v.	ACIT 15(1)(2), Mumbai
स्थायी लेखा सं./ PAN : AAACG1492R		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:		Shri Firoze Andhyarujina
Revenue by :		Shri V. Vidhyadhar (Sr. DR)

सुनवाई की तारीख /**Date of Hearing** : **08.05.2018**

घोषणा की तारीख /**Date of Pronouncement** : **09.05.2018**

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the assessee, being ITA No. 6259/Mum/2016 , is directed against appellate order dated 28.07.2016 passed by learned Commissioner of Income Tax (Appeals)-24, Mumbai (hereinafter called "the CIT(A)"), for assessment year 2012-13 , the appellate proceedings had arisen before learned CIT(A) from assessment order dated 23.03.2015 passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) of the Income-tax Act, 1961 (hereinafter called "the Act") for AY 2012-13.

2. The grounds of appeal raised by the assessee in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

"1. On the facts and in the circumstances of the case and in law the learned CIT(A) erred in sustaining depreciation disallowance of Rs. 17,76,230/-. The learned CIT(A) ignored the documentary evidences

and the upholding of the disallowance is thus imaginary and subjective in nature and thus needs to be deleted.

2. On the facts and in the circumstances of the case and in law the learned CIT(A) under a mistaken impression that the claim of depreciation was made against the House Property income. The upholding of the disallowance is on a mistaken fact needs to be deleted.

3. On the facts and in the circumstances of the case and in law the learned CIT(A) was duty bound to apply the provisions of section 38 to the depreciation claimed. The upholding of the disallowance of the depreciation claim is thus illegal and contrary to the provisions of law.

4. On the facts and in the circumstances of the case and in law the learned CIT(A) erred in upholding the disallowance u/s 14A of Rs. 48492/-. The sustaining of the disallowance is contrary to the facts and law thus illegal in nature.

5. On the facts and in the circumstances of the case and in law the learned CIT(A) erred in upholding the disallowance of Rs 48,492/-. The learned CIT(A) was duty bound to follow the Ruling on HDFC Bank of jurisdictional Bombay High Court and delete the addition so made. '

6. All the above grounds are independent and without prejudice to each another.

7. The appellant craves leave to add, amend, alter, substitute modify any or all grounds of appeal at the time of hearing."

3. The brief facts of the case are that the assessee is engaged in the business of manufacturing of Auto Ancillary parts. During the course of assessment proceedings u/s. 143(3) r.w.s 143(2), the AO observed that the assessee has received rental income to the tune of Rs. 57,83,250/- and after claiming deduction u/s. 24(a) of 30% towards repairs and maintenance, an amount of Rs. 40,48,275/- was offered by the assessee for taxation under the head 'Income from House Property' in the return of income filed with the Revenue. The AO observed that the assessee has claimed depreciation of Rs. 17,76,230/- on the same property which was let-out , which claim of the assessee was disallowed by the AO vide assessment order dated 23.03.2015 passed by the AO u/s 143(3).

4. Aggrieved by the assessment order dated 23.03.2015 passed by the AO u/s 143(3) , the assessee filed first appeal before learned CIT(A) . The assessee submitted before learned CIT(A) that assessee is engaged in the manufacture of auto ancillary parts. The assessee submitted that it has two

factories one at Bhandup and another at Daman . The factory at Bandup had two building structures which are classified as an existing and new building. It was submitted that is only part of the existing building structure which was let-out to an associated company namely Gold Seal Saargummi India P. Ltd. on which rent is received . The assessee submitted that it has only claimed depreciation of Rs. 12,996/- on existing building and claimed depreciation of Rs. 17,76,230/- on new building. Since only 701 Sq. Mtrs out of the total constructed area of 2528.05 Sq. Meters in the existing building was let-out which comes to around 27.455% of the total constructed area of the existing building . It was submitted that the depreciation to the tune of 27.455% of Rs. 12,996 which comes to Rs. 3568.05 should be disallowed. The assessee referred to provision of section 38 of the Act. Thus it was claimed that disallowance of Rs. 17,76,230/- as was made by the AO is not warranted as the said depreciation relates to new building which is in occupation of the assessee. The learned CIT(A) rejected the appeal of the assessee on the grounds that assessee has not filed any evidences to support its claim of disallowance of 27.455% of depreciation on the existing building which the assessee is claiming to be an area which was stated to be let-out to the tune of 701 Sq mtrs out of total constructed area of 2528.05 Sq mtrs of the existing building and the appeal of the assessee stood dismissed by learned CIT(A) vide appellate orders dated 28-07-2016 passed by learned CIT(A).

5. Aggrieved by the appellate order dated 28-07-2016 passed by learned CIT(A), the assessee has come in an appeal before the tribunal . The Ld. Counsel for the assessee stated before the tribunal supported by a certificate dated 07.05.2018 filed before the tribunal (placed in file), wherein it is stated that document at Sr. No. 1 to 5 were filed before the AO and also learned CIT(A), which comprises of the ITR acknowledgement along with computation of income , form no. 29B, audited financial statement, tax audit report and leave & licence agreement which are placed in paper book at page no. 1 to 56. It is also stated in the said certificate dated 07-05-2018 that apart from the these documents three pages consisting of building plans were filed before learned CIT(A) as an additional evidences which are placed in paper book /page no. 57 to 59. The Ld. Counsel for the assessee submitted that the finding of learned CIT(A) that assessee is making a bald

statement without any evidences on record is not correct because the leave & licence agreement along with building plans were filed before the learned CIT(A) albeit as an additional evidences. It was submitted that leave & licence agreements were also filed before the AO and learned CIT(A), while building plans were filed before the learned CIT(A) for the first time as an additional document/evidences. The learned CIT(A) has not called for the remand report with respect to the additional evidences filed before the learned CIT(A) for the first time which consisted of building plans and rather gave finding that no evidences were filed and only bald statements were made by the assessee.

6. The Ld. DR on the other hand submitted that finding is given by learned CIT(A) that no evidences has been filed by the assessee and only bald statements were made before the CIT(A) which was not supported by any evidences on record. In any case it was submitted that building plans are stated to filed for the first time before the learned CIT(A) as an additional evidences(if at all they were filed) and hence it was incumbent on learned CIT(A) to have forwarded these additional evidences to AO for remand report as mandated u/r 46A of the 1962 Rules which was not done by learned CIT(A). Thus it was prayed by the Ld. DR that the matter be restored to the file of the AO for fresh adjudication of the matter on merits. The assessee be directed to file cogent evidence to correlate land identification documents w.r.t. both existing structure of building and new building situated at Bhandup with the land identification in the leave and license agreement for letting out 701 square meters of constructed area to identify whether it was situated in existing building or new building as well to correlate with constructed area as per building plans/completion certificate area to find out the total constructed area.

7. We have considered rival contentions and perused the material on record . We have observed that the assessee is engaged in the business of manufacturing of Auto Ancillary parts . The assessee has two factories one located at Bhandup and second at Daman. We have observed from the audited accounts filed in paper book with the tribunal that assessee has reflected two set of building at Bhandup factory (paper book page 18) wherein there are two sets of building one classified as existing building and

second is classified as new building and their values are specified separately in the audited financial statements. The assessee also filed leave & licence agreement dated 07.10.2010 wherein the assessee is stated to have given on lease 701 Sq meters of constructed area on leave & licence basis, out of the following area of which the assessee is stated to be in possession and occupation in the said leave and license agreement, as under:-

“1. Gold Seal Engg. Products Pvt. Ltd. Is in possession and occupation of title land bearing CST No. 387, admeasuring about 3745 Sq.Mts. and Survey No. 75, Hissa No. 3/8 of Bhandup Division and bearing city Survey No. 389, admeasuring 1254 Sq, Mtrs. Out of Survey No. 75 Hissa No.1, situated at Agra Road, Bhandup, Mumbai 400 078(Annex1) as a Licensee vide a leave and license agreement dated 5.9.97. “

It was out of this aforesaid area , the assessee has given on leave & licence basis 701 Sq mtrs to Gold Seal Engg Products Limited out of the above area. The assessee has claimed to have filed building plans before learned CIT(A) as an additional evidences which are placed in paper book 57 to 59. These building plans were filed for the first time before learned CIT(A) . The learned CIT(A) on the other hand has given contrary finding that no evidences were filed before him and only bald statements were made. The claim of the assessee is that the said area of 701 Sq Mtrs which is let-out is out of the area of 2528.05 Sq. Meters situated in the existing building. The assessee claim is that the balance area of existing building and also the entire new building situated at Bhandup is in its possession of the assessee which is used for its business purposes. Thus it is claimed by the assessee that only the proportionate disallowance of depreciation of building consisting of existing structure to the tune of 27.455% which was let-out can be disallowed as that proportion of income from letting out of the said area is offered for taxation under the head ‘income of hence property’ and there is no provision in the 1961 Act to claim depreciation on the said income from house property but the rest of depreciation on existing building and the entire depreciation on new building is to be allowed to the assessee as the same were used for its business. However deduction on account of repair and maintenance to the tune of 30% u/s. 24(a) is already claimed by the assessee so far as rental income is concerned. We agree with this proposition of the assessee that the depreciation be disallowed to the tune of 27.455% of depreciation claimed on the existing structure as the said area is

claimed to have been given on rent, but both the authorities below have given concurrent finding of fact that evidences are not placed before them and in any case building plans were placed before the learned CIT(A) as an additional evidence for the first time . The learned CIT(A) did not call for the remand report from the AO w.r.t. these additional evidences which is in violation of Rule 46A of the Income Tax Rule 1962. We have also carefully gone through the entire spectrum of evidences placed in paper book before the tribunal and we also could not correlate the identification of property let out with identification of property called by the assessee as an existing structure out of which this area of 701 square meter was claimed to be carved out and let-out. These are findings of fact which require proper correlation and merely filing of documents are not sufficient. Thus, we are principally in agreement with the assessee's proposition that the depreciation in proportion of let out constructed area to the total constructed area of the building called as an existing building is to be disallowed but we are remitting the matter back to the file of the AO for limited purposes of verification and correlation by identification of the property consisting of an area of 701 Sq mtrs of area being let-out by the assessee with the land identification of the building and total constructed area of the said building . This ground is allowed for statistical purposes as indicated above.

8. The second issue in this appeal is with respect to the disallowance u/s. 14A r.w.r. 8D of the Income-tax Rules, 1962 . The assessee received dividend income of Rs. 2,800/- which was claimed as an exempt income u/s. 10(34). The assessee during assessment proceedings submitted that no expenditure has been incurred in relation to earning of an exempt income and it was prayed that no disallowance u/s 14A of the Act be made. The AO rejected the contentions of the assessee as in the opinion of the AO , the assessee did incurred various administrative and other expenses in relation to earning of an exempt income. The AO relied upon provisions of Section 14A(2) and 14A(3) and worked out disallowance by invoking Rule 8D of the 1962 Rule and made following disallowances:-

8D(2) (i)	The amount of expenditure directly relating to income which does not form part of total income		NIL
8D(2) (ii)	A	Amount of Interest paid	31,12,542
	B	Average value of the Investment	1,83,62,000
	C	Average value of the Total Assets	16,25,64,477
		A x B	
	C		
8D(2) (iii)	0.5% of the Average value of the Investment of Rs. 1,83,62,000/-		91,810
Aggregate of total amount as per clause 8(2)(i), 8(2)(ii), 8(2)(iii)			4,43,378
Already disallowed by assessee u/s 14A of the Act			3,94,886

The assessee had voluntarily disallowed Rs. 3,94,886/- u/s 14A of the 1961 Act r.w.r. 8D , while the AO enhanced the disallowance u/s 14A r.w.r. 8D to Rs. 4,43,378/- , wherein additional disallowance was worked out by the AO to Rs. 48492/-, vide assessment order date 23-03-2015 passed by the AO.

9. Aggrieved by the assessment order dated 23-03-2015 passed by the AO, the assessee filed an appeal before the learned CIT(A) . The assessee again reiterated before learned CIT(A) that no expenditure was incurred in relation to earning of an exempt income. It was submitted that an exempt income was only towards dividend income to the tune of Rs. 2800/- . It was submitted that the assessee applied Rule 8D of the 1962 Rules and made disallowance of Rs. 3,94,886/- despite no expenditure having been incurred in relation to earning of an exempt income , which disallowance was later increased to Rs. 4,43,378/- by the AO. It was also submitted that disallowance u/s 14A cannot exceed an exempt income. The assessee also relied upon decision of Hon'ble Bombay High Court in the case of HDFC Bank Ltd. v. DCIT reported in (2016) 383 ITR 529(Bom.) to contend that presumption will apply that investments in securities which are capable of

yielding exempt income were made out of own funds. It was submitted that owned funds being share capital and reserves as at 31-03-2012 were Rs. 13.06 crores while investments were only to the tune of Rs. 1.97 crores. The learned CIT(A) dismissed the appeal of the assessee on this ground also as no evidence were filed before the learned CIT(A) and only bald statements were made by the assessee before learned CIT(A), vide appellate order dated 28-07-2016.

10. Aggrieved by the appellate order dated 28-07-2016 passed by learned CIT(A), the assessee has filed an appeal with the tribunal . The assessee is aggrieved by the disallowance made by the AO which was later sustained by learned CIT(A) w.r.t. disallowance of expenditure incurred in relation to earning of an exempt income. The assessee has also submitted that disallowance u/s 14A cannot exceed an amount of exempt income which was to the tune of Rs. 2,800/-. The assessee has filed additional ground of appeal and prayed for its admission on the grounds that this is legal ground which does not require investigation of new facts as all the facts are emerging from records. The said additional ground is as under:-

“ On the facts and in the circumstances of the case and in law the disallowance under Rule 8D was required to be restricted to Rs2,800/-. The receipt of Dividend from share from Bank of India during the year was only Rs.2,800/- as against which the disallowance by applying rule 8D was of Rs.3,94,886/- which was further enhanced by Rs.48,492/- during the assessment . As against the actual receipt of dividend of Rs. 2,800/- the disallowance was of Rs.4,43,378/-. It is settled legal position that disallowance under Rule 8D cannot exceed the dividend recieved. It is therefore submitted that the addition under Rule 8D be restricted to Rs.2,800/-.”

The learned DR fairly stated that this is a legal grounds and facts are emerging from records. The learned DR left to the Bench to decide as to the admission of this ground raised as an additional ground of appeal. After hearing both the parties and in the interest of justice, we direct admission of the additional ground filed by the assessee before the tribunal keeping in view decision of Hon'ble Supreme Court in the case of (1998) NTPC Limited v.CIT reported in 229 ITR 383(SC) . We order accordingly.

The assessee has submitted that no expenses were incurred in relation to the earning of an exempt income but however keeping in view Section 14A r.w.r. 8D of the 1962 Rules, voluntary disallowance was made to the tune of Rs.3,94,886/- . It was brought to the notice of both the AO and learned CIT(A) that no expenses were incurred by the assessee in relation to earning of an exempt income. It was submitted that the AO enhanced the disallowance by Rs. 48,492/- by invoking Rule 8D read with Section 14A. It was submitted that the assessee own share capital and reserves which represented owned funds(interest free) were to the tune of Rs. 13.06 crores and investments were to the tune of Rs. 1.97 crores and hence presumption will apply that the assessee invested own funds for making investments. The assessee relied upon decision of Hon'ble Bombay High Court in the case of HDFC Bank Limited(Supra) and decision in the case of Reliance Utilities and Power Limited v. CIT (2009) 313 ITR 340(Bom). It was also submitted that the entire disallowance u/s. 14A cannot exceed exempt income which was to the tune of 2,800/- being dividend received which was claimed as an exempt income u/s 10(34). The Ld. Counsel for the assessee relied upon following decisions to contend that disallowance u/s. 14A cannot exceed an exempt income :

- a. Maxopp Investment Limited v. CIT(2018) 402 ITR 640(SC)
- b. Cheminvest Limited v. CIT. (2015) 378 ITR 33 (Delhi HC)
- c. Joint Investments Private Ltd. v. CIT (2015) 373 ITR 694(Delhi HC)
- d. M/s. Anjaneya Cold Storage Limited v. ACIT ITA no. 6079/Del/2014 order dated 25.10.2017
- e. Daga Global Chemicals P. Ltd. v. ACIT (2017) 82 taxmann.com 254 (Mumbai Trib.)

The Ld. DR on the other hand fairly submitted that proposition that disallowance u/s 14A cannot exceed an exempt income is a covered issue by several judgments of the Courts.

11. we have considered rival contentions and perused material on record . We have observed that the assessee received dividend income of Rs. 2,800/- which was claimed as an exempt income u/s 10(34) during the relevant previous year. The assessee suo moto disallowed Rs. 3,94,886/- u/s 14A by invoking Rule 8D of the 1962 Rules. The assessee however claimed

consistently that no expenditure was incurred by the assessee in relation to earning of an exempt income. The working of disallowance as was worked by the assessee u/s 14A r.w.r. 8D read as under :

“GOLDSEAL ENGINEERING PRODUCTS PRIVATE LTD.

Asst. Year 2012/2013

Statement of disallowance u/s 14 A of the
I.T. Act read with Rule 8D of the I.T Rules

A	Interest		Rs. 2,692,777/-
B	Average value of investments capable of yielding exempt income		
	As on 31/03/2011	Rs. 17,162,000	
	As on 31/03/2012	Rs. 19,462,000	

	Total	Rs. 36,624,000	

		50% of above	Rs. 18,312,000/-
C	Average value of total assets		
	As on 31/03/2011	Rs. 129,979,298	
	As on 31/03/2012	Rs. 195,149,656	

	Total	Rs. 325,128,954	

		50% of above	Rs. 162,564,477/-
	Disallowance		
	<u>AXB</u>		
	C		
	i.e	<u>Rs. 26.92.777 X Rs. 1,83,12,000</u>	
		Rs. 16,25,64,477	Rs. 303.326
	Add : 0.5% of B		
	i.e. 0.5% of Rs. 1,83,12,000		<u>Rs.91,560</u>
	Total disallowance u/r. 8D		<u>Rs.394,886</u>

Thus it could be seen that the assessee made suo-motu disallowance u/s 14A r.w.r. 8D towards interest expenses under rule 8D(2)(ii) of Rs. 3,03,326/- and indirect administrative expenses of Rs. 91,560/- under Rule 8D(2)(iii) by applying 0.5% of average investment. Thus , as could be seen

there was no disallowance made towards direct expenses which was disallowed by the assessee by applying Rule 8D(2)(i) r.w.s. 14A. The assessee has claimed that no expenditure was incurred by the assessee in relation to earning of an exempt income. Not being satisfied with the contentions and claim of the assessee, the AO invoked provisions of Section 14A(2) and 14A(3) of 1961 Act and applied Rule 8D(2)(ii) and Rule 8D(2)(iii) and made total disallowance of Rs. 4,43,378/- leading to enhanced disallowance of Rs. 48,492/-. Thus, again there was no disallowance made by the AO towards expenditure directly relating to earning of an exempt income, which was later confirmed by learned CIT(A). Now, the legal ground is raised before us that disallowance u/s 14A cannot exceed an exempt income. The exempt income earned by the assessee during the relevant period was to the tune of Rs. 2800/- which was claimed as an exempt income. The authorities below have not identify expenses directly incurred by the assessee for earning an exempt income. The disallowance of interest expenses by invoking Rule 8D(2)(ii) r.w.s 14A has been made on the proposition that mixed pool of funds were used by the assessee but no co-relation of the interest bearing loans raised with the investments made in the securities capable of yielding exempt income was brought on record. We have also observed from the Balance sheet which is filed by the assessee and which is placed in paper book at page no. 14 that the assessee's own funds(interest-free) of share capital and reserves were to the tune Rs.13.06 crores while the investments in securities which are capable of yielding exempt income are to the tune of 1.97 crores, thus own funds available with the assessee are higher than the investments in securities and presumption will apply that the assessee invested its own interest free funds for making investment in securities and hence no disallowance can be made towards interest expenses u/r 8D(2)(ii) of the 1962 Rules unless the presumption is rebutted by Revenue which has not been done in this case. Reliance is placed on the decision of Hon'ble Bombay High Court in the case of Reliance Utilities and Power Ltd.(supra) as well as decision of Hon'ble Bombay High Court in the case of HDFC Bank Ltd. (supra). Reference is also drawn to the decision of Hon'ble Gujarat High Court in the case of CIT v. Sintex Industries Ltd. reported in (2017) 82 taxmann.com 171(Guj.). The SLP filed by Revenue with Hon'ble Supreme Court against this decision of Hon'ble Gujarat High Court was dismissed by

the Hon'ble Supreme Court in Pr. CIT v. Sintex Industries Limited(2018) 93 taxmann.com 24(SC).

Hon'ble Delhi High Court in the case of Joint Investments Limited(supra) has held that disallowance u/s 14A cannot exceed an exempt income, which is reproduced hereunder :-

"By no stretch of imagination can s. 14A or r. 8D be interpreted so as to mean that the entire tax exempt income is to be disallowed. The window for disallowance is indicated in s. 14A, and is only to the extent of disallowing expenditure "incurred by the assessee in relation to the tax exempt income". This proportion or portion of the tax exempt income surely cannot swallow the entire amount as has happened in this case."

Reference is also drawn to Article 265 of the Constitution of India which clearly mandate that the taxes are not to be imposed save by authority of law and no taxes shall be levied or collected except by authority of law. Thus keeping in view mandate of article 265 of the Constitution of India read with factual matrix of the case and the case laws as discussed by us in our conclusions, we hold that disallowance u/s. 14A in the instant case before us cannot exceed a sum of Rs. 2,800/- and hence we restrict disallowance u/s. 14A to Rs. 2,800/- not withstanding that the assessee voluntarily suo-motu disallowed a sum of Rs. 3,94,886/- u/s 14A r.w.r. 8D in its return of income filed with the Revenue. We allow additional ground of appeal raised by the assessee. The assessee succeeds in this additional ground. We order accordingly.

12. The appeal of the assessee is allowed as indicated above.

Order pronounced in the open court on 09.05.2018

आदेश की घोषणा खुले न्यायालय में दिनांक: 09.05.2018 को की गई ।

Sd/-

(MAHAVIR SINGH)
JUDICIAL MEMBER

Sd/-

(RAMIT KOCHAR)
ACCOUNTANT MEMBER

Mumbai, dated: 09.05.2018

copy to...

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

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BY ORDER

**DY/ASSTT. REGISTRAR
ITAT, MUMBAI**