

**IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT),
'G' BENCH MUMBAI**

BEFORE SHRI SAKTIJIT DEY, JM

&

SHRI M.BALAGANESH, AM

**ITA No.6486/Mum/2018
(Assessment Year :2013-14)**

Dy. Commissioner of Income Tax, Circle-14(1)(2) Mumbai Room No.475, 4 th Floor Aayakar Bhavan M.K.Road, Mumbai – 400 020	Vs.	M/s. Godrej Properties Limited Ground Floor Phirojshanagar, Eastern Express Highway, Vikhroli East Mumbai – 400 079
PAN/GIR No. AAACG3995M		
(Appellant)	..	(Respondent)

**ITA No.6637/Mum/2018
(Assessment Year :2013-14)**

M/s. Godrej Properties Limited Esplande House 2 nd Floor 29, Hazarimal Somani Marg, Fort, Mumbai – 400 001	Vs.	Dy. Commissioner of Income Tax, Circle-14(1)(1) Mumbai Room No.404, 4 th Floor Aayakar Bhavan M.K.Road, Mumbai – 400 020
PAN/GIR No. AAACG3995M		
(Appellant)	..	(Respondent)

Revenue by	Shri V. Vinodkumar
Assessee by	Shri Farooq V. Irani
Date of Hearing	29/10/2020
Date of Pronouncement	11/11/2020

आदेश / ORDER**PER M. BALAGANESH (A.M.):**

These cross appeals in ITA No.6486/Mum/2018 & 6637/Mum/2018 for A.Y.2013-14 arise out of the order by the Id. Commissioner of Income Tax (Appeals)-22, Mumbai in appeal No. CIT(A)-22/IT/10195/2016-17 dated 27/08/2018 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 25/02/2016 by the Id. Dy. Commissioner of Income Tax – 14(1)(1), Mumbai (hereinafter referred to as Id. AO).

2. The only issue involved in these cross appeals is with regard to disallowance made u/s 14A of the Act read with Rule 8D(2) of the Income Tax Rules.

3. We have heard the rival submissions and perused the materials available on record. At the outset, the Id DR sought for an adjournment on the ground that he requires some time to go through these files. As the issue involved in both the appeals is only disallowance made under section 14A of the Act read with Rule 8D(2) of the Rules, these items were passed over and sufficient time was given to Id DR to go through the same. Later it was taken up for hearing. We find that the assessee had earned dividend income of Rs 1,54,67,944/- during the year under consideration and claimed the same as exempt. We find that the assessee had made suo moto disallowance of Rs 80,41,586/- u/s 14A of the Act while filing its return of income. We find that the basis of disallowance of Rs 80,41,586/- made by the assessee is as under:-

Under Rule 8D(2)(i)	-	Rs 3,21,571
Under Rule 8D(2)(ii)	-	Rs 7,35,564
Under Rule 8D(2)(iii)	-	Rs 69,84,451

		Rs 80,41,586

4. We find that the Id AO substituted the disallowance u/s 14A of the Act read with Rule 8D(2) of the Rules as under:-

Under Rule 8D(2)(i)	-	Rs 3,21,571
Under Rule 8D(2)(ii)	-	Rs 3,00,91,762
Under Rule 8D(2)(iii)	-	Rs 69,84,451

		Rs 3,73,97,784

Less: Disallowance voluntarily made by assessee

Rs 80,41,586

Disallowance made by the Id AO

Rs 2,93,56,198

5. The assessee pleaded before the Id CITA that it had sufficient own funds and hence there cannot be any disallowance of any interest under the second limb of Rule 8D(2) of the Rules. It also pleaded that only those investments which had actually yielded exempt income should be considered for considering the disallowance under second and third limb of Rule 8D(2) of the Rules. The assessee also submitted that the said issue has been decided in its favour by the predecessor Id CITA for the Asst Years 2011-12 and 2012-13.

6. The Id CITA observed as under:-

“5.3 I have considered the facts of the case and the appellant's submissions. As far as disallowances under Rule 8D(2)(i) and Rule 8D(2)(iii) are concerned, the suo moto disallowances made by the appellant and the disallowances computed by the Assessing Officer are the same and are not being disputed. In respect of proportionate interest under Rule 8D(2)(ii), the Assessing Officer has computed the disallowance at Rs. 3,00,91,762/- as against the appellant's suo moto disallowance of Rs. 7,35,564/-. Perusal of the appellant's financials shows the Share Capital and Reserves & Surplus as at beginning and close of the year were 1399,58,32,019/- and Rs. 1364,29,37,801/-respectively. The total of non-current investments and current investments as at beginning and close of the year were Rs.102,38,93,978/- and 170,03,18,306/- respectively. This shows that the appellant's own interest free funds are in excess of the total investments made. The Hon'ble jurisdictional High Court in the case of CIT Vs. Reliance Utilities & Power Ltd. 313 ITR 340 (Bom.), held that if there are funds available, both, interest-free and overdraft and/or loans taken, then a presumption can be drawn that investments would be out of interest-free funds. This ratio laid down by the Hon'ble Bombay High Court has been further reaffirmed in the cases of CIT Vs. HDFC Bank Ltd, [2014] (49 taxmann.com 335) (Bom.) and HDFC Bank Ltd. Vs. DCIT [2016] (67 taxmann.com 42) (Bom.). In view of the legal position on this issue as decided by the Hon'ble jurisdictional High Court, the proportionate interest disallowance under Rule 8D (2)(ii) over and above the suo moto disallowance made by the appellant is deleted. The appellant's grounds of appeal on the issue of disallowance u/s 14A are allowed.

7. Aggrieved, both the assessee as well as the revenue are in appeal before us. We find that the revenue is in appeal against the action of the Id CITA deleting the interest disallowance made under second limb of Rule 8D(2) of the Rules over and above the disallowance made by the assessee voluntarily in the return. We find that the assessee is in appeal against the interest disallowance of Rs 7,35,564/- upheld by the Id CITA (though voluntarily made by the assessee in the return) under second limb of Rule 8D(2) of the Rules; even if it is to be made, on without prejudice basis, only the net interest (i.e interest paid less interest

income) should be considered for such disallowance and that only those investments which had actually yielded exempt income should be considered for working out the disallowance under second and third limb of Rule 8D(2) of the Rules.

8. We find that there is a categorical finding recorded by the Id CITA that the assessee is having sufficient own funds in the form of share capital and reserves and surplus at the beginning and close of the year at Rs 1399,58,32,019/- and Rs 1364,29,37,801/- respectively, as against the total of non-current investments and current investments as at the beginning and close of the year at Rs 102,38,93,978/- and Rs 170,03,18,306/- respectively. This factual finding given by the Id CITA was not controverted by the Id DR before us. Hence by placing reliance on the decisions of Hon'ble Jurisdictional High Court in the case of CIT vs HDFC Bank reported in 366 ITR 505 (Bom) ; CIT vs Reliance Utilities and Power Ltd reported in 313 ITR 340 (Bom) and PCIT vs Shapoorji Pallonjiand Co Ltd reported in 423 ITR 220 (Bom) for the Asst Year 2010-11 and decision of Hon'ble Gujarat High Court in the case of PCIT vs Sintex Industries Ltd reported in 82 taxmann.com 171 (Gujarat) for the Asst Year 2010-11, where revenue SLP was also dismissed by Hon'ble Supreme Court reported in 255 Taxman 171 (SC) vide order dated 23.3.2018, wherein it was held that if the interest free funds available with the assessee is more than the investments which had actually yielded exempt income, then the general presumption that such investments were made out of interest free funds and not out of borrowed funds, would prevail. Hence the ground raised by the revenue that the decisions relied upon by the Id CITA in his appellate order pertain to assessment years upto 2005-06 hold no water. Accordingly, there cannot be any disallowance of interest under the second limb of Rule

8D(2) of the Rules. Hence we direct the Id AO to delete the disallowance of interest under second limb of Rule 8D(2) of the Rules to the extent of Rs 3,00,91,762/- which also includes the disallowance voluntarily made by the assessee in the return to the extent of Rs 7,35,564/-. This is in view of the fact that once sufficient own funds are available with the assessee for making investments, then there cannot be any disallowance of interest under second limb of Rule 8D(2) of the Rules, eventhough the same was erroneously made by the assessee in the return of income. We are conscious of the fact that this direction may eventually go to reduce the returned income of the assessee and in that regard, we hold that the revenue is authorised to collect taxes in accordance with law as per Article 265 of the Constitution of India and not based on the consent or acceptance of the assessee either in the return or during the course of assessment or appellate proceedings. There is no estoppel against the statute. In view of our aforesaid decision directing the Id AO to delete the disallowance of interest under second limb of Rule 8D(2) of the Rules, the alternative ground raised by the assessee on without prejudice basis that only the net interest is to be considered for working out the disallowance, need not be gone into and accordingly not adjudicated herein.

9. With regard to disallowance of indirect expenses under third limb of Rule 8D(2) of the Rules, we direct the Id AO to consider only those investments which had actually yielded exempt income for working out the disallowance thereon by placing reliance on the decision of Special Bench of Delhi Tribunal in the case of Vireet Investments reported in 165 ITD 27 (Del)(SB). The Id AO is directed to recompute accordingly and further reduce the disallowance already made by the assessee in the

return under the third limb thereon. The grounds raised by the assessee as well as the revenue are disposed off in the aforesaid terms.

10. In the result, the appeal of the revenue is dismissed and appeal of the assessee is allowed.

Order pronounced on 11/11/2020 by way of proper mentioning in the notice board.

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Mumbai; Dated 11/11/2020
KARUNA, *sr.ps*

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai