

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'F' NEW DELHI**

**BEFORE SHRI R. K. PANDA ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

**I.T.A. No. 7434/DEL/2017 (A.Y 2013-14)
(THROUGH VIDEO CONFERENCING)**

Addl. CIT Special Range-7 Room No. 211, C. R. Building, I.P. Estate, New Delhi (APPELLANT)	Vs	PNB Gilts Ltd. 4 th Floor, Punjab National Bank, 5, Sansad Marg, New Delhi PAN: AAACP7685B (RESPONDENT)
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Appellant by	Sh. Shiv Swaroop Singh, Sr. DR
Respondent by	Ms. Sana Bagai, CA

Date of Hearing	29.07.2021
Date of Pronouncement	04.08.2021

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the Revenue against order dated 28/09/2017 passed by CIT(A)-7, New Delhi for assessment year 2013-14.

2. The grounds of appeal are as under:-

1. *“On the facts and under the circumstances of the case, Ld. CIT(A) has erred in law in deleting the disallowance of Rs. 4,36,45,000/- u/s 14A of IT Act ignoring the mandatory nature of Rule 8D and the binding CBDT Circular No. 5/2014 dated 11.02.2014.*
2. *On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting disallowance of Rs. 1,70,42,000/- u/s 36(i)(iii) of the Income Tax act, 1961 as the assessee failed to prove the business*

purpose for the utilization of funds raised from borrowed capital.

3. The assessee is a NBFC. The assessee company filed its return of income for Assessment Year 2013-14 declaring a total income of Rs.84,44,73,590/-. The case was selected for scrutiny under CASS. The Assessing Officer vide order dated 4/3/2016 made additions/disallowance u/s 14A to the extent of Rs.4,73,10,000/- as well as disallowance of interest u/s 36(i) (iii).

4. Being aggrieved by the assessment order, the assessee filed appeal before the CIT(A). The CIT(A) partly allowed the appeal of the assessee.

5. The Ld. DR submitted that the CIT(A) erred in deleting the disallowance of Rs.4,36,45,000/- u/s 14A of the Income Tax Act ignoring the mandatory nature of Rule 8D and the binding CBDT Circular No. 5/2014 dated 11/2/2014. The Ld. DR further submitted that the CIT(A) also erred in deleting the disallowance of Rs. 1,70,42,000/- u/s 36(i)(iii) of the Act as the assessee failed to prove the business purpose for the utilization of funds raised from borrowed capital. The Ld. DR submitted that the Assessing Officer has rightly disallowed the amount u/s 14A as the assessee has received dividend an interest in the present year.

6. The Ld. AR relied upon the decision of the Tribunal in Assessment Year 2010-11 in assessee's own case wherein the similar additions were deleted by the Tribunal. The Ld. AR further submitted that for Assessment Year 2012-13, the Tribunal has remanded back both the issues to the file of the Assessing Officer in light of the decision of Hon'ble Supreme Court in case of Maxopp Investments Ltd. 402 ITR 640.

7. We have heard both the parties and perused the material available on record. It is pertinent to note that though in Assessment Year 2011-12, the issue was decided in favour of the assessee by the Tribunal, however, the decision of the Hon'ble Supreme Court in case of Maxopp Investment Ltd. was not available at the time of giving the said decision before the Tribunal. As per

the Assessment Year 2012-13, the facts are identical in present Assessment Year as well. The Tribunal in Assessment Year 2012-13 being ITA No. 682/Del/2017 order dated 1/5/2020 held as under:-

“3.6 We have heard rival submission of the parties on the issue in dispute. Though in assessment year 2011-12 the issue in dispute has been decided by the Tribunal in favour of the assessee , but in view of the decision of the Hon’ble Supreme Court in the case of Maxopp investment Ltd (supra), cited by the learned DR, the issue in the year under consideration need to be reconsidered. The Ld. CIT(A) has deleted the disallowance under rule 8D(2)(ii) amounting to ₹ 392.6 lakhs on two grounds.

3.7 First ground being the exempt income earned on stock-intrade will not attract disallowance under section 14A of the act in view of the decision of the Hon’ble Karnataka High Court in the case of CCI Ltd Vs JCIT (supra). However, Hon’ble Supreme Court in the case of Maxopp Investment Ltd (supra) after considering the decision of the Hon’ble Karnataka High Court in the case of CCI Ltd (supra) held as under :

“36) There is yet another aspect which still needs to be looked into. What happens when the shares are held as ‘stock-in-trade’ and not as ‘investment’, particularly, by the banks? On this specific aspect, CBDT has issued circular No. 18/2015 dated November 02, 2015.

37) This Circular has already been reproduced in Para 19 above. This Circular takes note of the judgment of this Court in Nawanshahar case wherein it is held that investments made by a banking concern are part of the business or banking. Therefore, the income arises from such investments is attributable to business of banking falling under the head ‘profits and gains of business and

profession'. On that basis, the Circular contains the decision of the 6 ITA No.682/Del/2017 Board that no appeal would be filed on this ground by the officers of the Department and if the appeals are already filed, they should be withdrawn. A reading of this circular would make it clear that the issue was as to whether income by way of interest on securities shall be chargeable to income tax under the head 'income from other sources' or it is to fall under the head 'profits and gains of business and profession'. The Board, going by the decision of this Court in Nawanshahar case, clarified that it has to be treated as income falling under the head 'profits and gains of business and profession'. The Board also went to the extent of saying that this would not be limited only to co-operative societies/Banks claiming deduction under Section 80P(2)(a)(i) of the Act but would also be applicable to all banks/commercial banks, to which Banking Regulation Act, 1949 applies.

38) From this, Punjab and Haryana High Court pointed out that this circular carves out a distinction between 'stock-in-trade' and 'investment' and provides that if the motive behind purchase and sale of shares is to earn profit, then the same would be treated as trading profit and if the object is to derive income by way of dividend then the profit would be said to have accrued from investment. To this extent, the High Court may be correct. At the same time, we do not agree with the test of dominant intention applied by the Punjab and Haryana High Court, which we have already discarded. In that event, the question is as to on what basis those cases are to be decided where the shares of other companies are purchased by the assesseees as 'stock-in-trade' and not as 'investment'. We proceed to discuss this aspect hereinafter.

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 7 ITA No.682/Del/2017 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.”

3.8 On the shares held as stock-in-trade , an assessee earn profit or loss on trading of the those share and additionally earn dividend also. The Hon’ble Supreme Court has directed to apportion expenses towards exempt dividend income from stockin-trade as well as profit earned on trading of stock-in-trade and the expenses apportioned toward exempt income are only held as liable for disallowance. Accordingly , the Assessing Officer is required to apportion the part of expenses related to exempt dividend income and consider that part for disallowance only .

3.9 The second ground on which the Ld. CIT(A) has deleted the disallowance is that in view of decision in the case of CIT Vs 8 ITA No.682/Del/2017 Reliance Utilities and Power Ltd 313 ITR 340(SC), if there are sufficient interest-free funds available, it can be presumed that investment had been made out of from such funds and thus no disallowance for interest is required. Similar finding has been given by the Hon'ble Bombay High Court in the case of CIT Vs HDFC bank Ltd (supra). The assessee has claimed that shares capital and reserve and surplus of the assessee amounting to ₹ 577.64 crores is more than the stock in trade of ₹ 68.50 crores.

3.9 But we have seen that exempt income is not only from the equity shares kept as stock-in-trade but also from interest of ₹ 4,15,80,043/- received on bonds. The same has been invested in compliance of the Reserve Bank of India (RBI) Rules. But once exempt income is earned, then interest for corresponding borrowing would be liable for disallowance. Thus, the assessee is required to demonstrate not only investment in shares had been out of interest free funds but investment in Bonds was also made out interest free own funds.

3.10 In view of the above facts and circumstances of the case , we feel it appropriate to restore this issue to the file of the learned Assessing Officer for deciding a fresh in view of our finding above and in accordance with law. The assessee shall provide all details of the investment in assets yielding exempt income as well as own funds and funds borrowed. The assessee shall also provide details of apportionment of interest expenses in relation to a stock-in-trade towards earning dividend income as well as towards earning trading profit. If the AO finds that entire investment in assets yielding exempt income has been made out of the interest free own funds , then no disallowance will be called for under rule 8D(2)(ii) and he will not be

required to look into the 9 ITA No.682/Del/2017 apportionment of the expenses towards dividend income form shares held as stock in trade. The ground No. 1 of the appeal of the Revenue is accordingly allowed for statistical purposes.”

Since, Ground No. 1 of the Revenue’s appeal is also identical, therefore, we are remanding back the said issue to the file of the Assessing Officer to decide the issue afresh after verification of the factual aspects and evidences before the Assessing Officer. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. Thus, Ground No. 1 is partly allowed for statistical purpose.

8. As regards Ground No. 2 of the Revenue’s appeal, the same is also decided by the Tribunal in 2010-11 but facts are not identical to the present Assessment Year and are much more similar to that of the Assessment Year 2012-13. The Tribunal in 2012-13 held as under:-

“5.2 We have heard rival submission of the parties on the issue in dispute. The core issue is whether diminution or reduction in price of the stock-in-trade can be allowed while computing business income. In our opinion, there is no dispute that the assessee is at liberty to value its stock at cost or market value, whichever is lower as per consistent method of accounting, and such reduction if any , in value of the shares held as stock-in-trade will be allowed . But, if such a provision is made outside the trading account (only while computation of income) then same may not be allowable. In the facts of the case , it is not clear whether the provision for diminution in value of stock-in-trade has been made out of the trading account or within the trading account , therefore, we feel it appropriate to restore the issue to the file of the Assessing Officer for verifying the facts from the books of accounts and other records of the assessee and decide 13 ITA No.682/Del/2017 the issue in dispute

afresh in accordance with law. We order accordingly. The ground of the appeal is accordingly allowed for statistical purpose.

Hence, Ground No. 2 of the Revenue's appeal is also being identical, therefore, we are remanding back the said issue to the file of the Assessing Officer to decide the issue afresh after verification of the factual aspects and evidences before the Assessing Officer. Needless to say, the assessee be given opportunity of hearing by following principles of natural justice. Thus, Ground No. 2 is partly allowed for statistical purpose.

9. In the result, appeal of the Revenue is partly allowed for statistical purpose.

Order pronounced in the Open Court on this 04th Day of August, 2021.

Sd/-

**(R. K. PANDA)
ACCOUNTANT MEMBER**

Sd/-

**(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

Dated : 04/08/2021

*R. Naheed **

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

