THE INCOME TAX APPELLATE TRIBUNAL
"F" Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Amarjit Singh (JM)

I.T.A. No.4773/Mum/2019 (Assessment Year : 2008-09)
I.T.A. No. 4774/Mum/2019 (Assessment Year : 2006-07)

Union Bank of India Union Bank Bhavan, 6th Floor, 239, Vidhan Bhavan Marg, Nariman Point Mumbai-400 021 PAN : AAACU0564G	Vs.	DCIT,LTU(2) 29th Floor, Centre 1 World Trade Centre, Cuffe Parade Mumbai-400 005
(Appellant)		(Respondent)

Assessee by	Shri C.Naresh
Department by	Shri Brajendra Kumar
Date of Hearing	18/06/2021
Date of Pronouncement	13 /08/2021

O R D E R

Per Shamim Yahya (AM) :-

These are Assessee's appeals directed against respective orders of learned CIT(A) pertaining to assessment years 2006-07 and 2008-09.

2. Since the issues are common and connected and the appeals were heard together, these have been consolidated and disposed off together for the sake of convenience.

3. Appeal for AY 2006-07. Grounds of appeal read as under :-

On jurisdiction

1.1 The Ld. CIT(A) erred in holding that the deduction allowed u/s 36(1)(viia) in order dated 13.10.2010 could be rectified u/s 154 on 31.03.2018 which was beyond the limitation period as per section 154(7).

1.2 Without prejudice to above contention CIT(A) ought to have appreciated that the issue of restriction of deduction u/s 36(1)(viia) is a highly legal and debatable issue and cannot be a matter of rectification u/s 154.

On Merits

2.1 The Ld. CIT (A) erred in holding that eligible amount u/s 36(1) (viia) is to be restricted to provision made in the books during the current year without appreciating that the deduction is quantified based on total income and rural advances and is to be allowed irrespective of the quantum of provision for bad and doubtful debts made in books.

2.2 Without prejudice to above contention, Id. CIT(A) erred in not considering order of Hon'ble ITAT in appellants own case in ITA 6922/M/2013 for AY 2009-10 and allowing deduction u/s 36(1){viia) based on provision held.

4. Brief facts of the case are as under:-

The facts of the case are that in this case the assessee has filed return of income for the year under consideration by declaring loss at Rs.53,94,54,638/- under normal provision of the Act and income at Rs.399,54,21,732/- u/s 115JB of the Act. The AO passed the order u/s 143(3) of the Act on 17.03.2008 by determining the total income at Rs.697,52,82,1307- under normal provisions of the Act and at Rs.1724,68,93,000/- us 115JB of the Act and allowed deduction u/s 36(1)(viia) of the Act of Rs.268,51,06,964/- as claimed by the assessee in the return of income. The assessee filed an appeal before the CIT(A) against the order passed u/s 143(3) on 17.03.2008 and the CIT(A) vide his order dated 29.03.2010 gave partial relief to the assessee. However, while giving effect to CIT(A)'s order on 13.10.2010, AO allowed excess deduction of Rs.234,53,69,085/- u/s 36(1)(viia) of the Act. Subsequently, the income was reassessed u/s 143(3) rws 147 of the Act. As there were mistakes apparent from record, the AO issued notice u/s 154/155 of the Act. In response, the submission made by the assessee was not acceptable to the AO and hence a rectification order u/s 154 of the Act was passed by the AO by disallowing the excess deduction allowed u/s 36(1)(viia) of the Act of Rs.234,53,69,085/- and the total income was arrived at (-) Rs.12,32,17.134A. Against this action of the AO, the assessee appealed before Ld.CIT(A).

5. Ld.CIT(A) upheld the jurisdiction by holding as under:-

6.3 I have carefully considered the facts of the case, oral contentions and written submissions of the assessee, discussion of the AO in the rectification order u/s 154 of the Act and material available on record, It is seen from the copy of notice issued u/s 154/155 of the Act dated 15.03.2018 that the AO at para has clearly mentioned that the assessment order passed u/s 143(3) r.w.s. 147 of the Act dated 28.11.2013 for A,Y. 2006-07 requires to be amended as there is a mistake apparent from record within the meaning of Sec. 154/155 of the Act. The AO further has given particulars

of the mistake proposed to be rectified at para 3,4,& 5 of the said notice and while eventually passing the order the AO has rectified the order so passed u/s. 143(3) r.w.s. 147 of the Act dated 28.11.2013. It is, seen that the notice u/s. 154 was issued which is dated 15.03.2018 and the order sought to be rectified was the order which was passed on 28.11.2013. The 4 year limitation for the order passed u/s 143(3) r.w.s. 147 dated 28.11.2013 shall be 31.03.2018 whereas notice to rectify the said order was issued u/s 154/155 is dated 15.03.2018. Accordingly, the notice so issued by the AO proposing to rectify the said order is well within 4 years from the end of the F.Y. in which the order sought to be rectified was passed. Under the facts and circumstances, the action of the AO is well within the limit of time provided u/s 154(7) of the Act. The assessee in their submission have sought to contend that the issue of deduction u/s 36(1)(viia) arose only in the order dated 13.10.2010 and not in the order dated 28.11.2013. In respect of such submissions and contentions of the assessee it is stated that the original order u/s 143(3) was passed on 17.03.2008 and the deduction as claimed by the assessee u/s 36(1)(viia) was allowed to it in the said order. In the consequent appeal filed by the assessee neither any issue relating to deduction u/s 36(1)(viia) was agitated by the appellant nor was adjudicated by the Ld. CIT(A). However, in the order giving effect to the order of Ld. CIT(A) discrepancy crept in wherein deduction u/s 36(1)(viia) was allowed at Rs.503,04,76,050/- as against the correct amount of Rs.265,51,06,965/-. It is further the fact of the case that such mistake which crept in continued even in the order passed u/s 143(3) r.w.s. 147 of the Act on 28.11.2013. It is the order which was passed on 28.11.2013 therefore is the last order where the mistake remained and to that extent the earlier order got merged with this order. As such, the earlier orders which were passed by the AO including the order giving effect to the order of CIT(A) would finally get merged with the order passed u/s 143(3) r.w.s. 147 passed on 28,11.2013. Accordingly, it is this order which has been sought to be rectified by the AO and has been rectified by the AO within the limitation given u/s 154(7) of the Act. Accordingly, the contentions and submissions of the assessee that the order so passed by the AO is beyond the limitation and therefore out of jurisdiction is not found to be acceptable and are rejected

6. As regards, the issue on the merits, Ld.CIT(A) has held as under:-

7.3 I have carefully considered the facts of the case, oral contentions and written submissions of the assessee, discussion of the AO in the rectification order u/s 154 of the Act and material available on record. In regard to the submission of the assessee that the issue is covered in their favour by the decisions of Hon'ble Tribunal including in their own case, it is stated that the impugned order is order u/s 154 of the Act and what has been done is only that the claim as were allowed to the assessee in the original order passed u/s 143(3) dated 17.03.2009 has been restored. It is mentioned here that in respect of the claim u/s 3G(1)(viia), the assessee in its return had claimed an amount of Rs.268,51,06,964/- which was allowed in the order passed u/s 143(3) dated 17.03.2008. At any subsequent stage there was no debate, dispute on

> this issue in respect of the quantum of allowance either in the order passed by the AO or passed by the Ld. CIT(Appeal). Due to inadvertence in the order giving effect to the order of CIT(A) an higher amount of Rs.503,04,76.050A was allowed u/s 36(1)(viia) despite the fact that the issue relating to allowance u/s 36(1)(viia) was neither by the appellant before CIT(Appeals) nor was adjudicated by the Ld. CIT(Appeal). Accordingly, an error crept into the order giving effect to the order of Ld. CIT(A) wherein such amount of Rs.503.04 crores was considered as deduction and was allowed therein. This mistake continued even in the order passed u/s 143(3) r.w.s. 147 of the Act and therefore such a mistake was purely a mistake apparent from record and rectifiable u/s 154 of the Act. For the sake of clarity, it is mentioned that it was nowhere in the past that based on any discussion, consideration of submission of assessee and subsequent position taken by the AO in any of the order that the amount of Rs.503.04 crores was allowed u/s 36(1)(viia). Accordingly, the issue of correct allowance of deduction u/s 36(1)(viia) to the tune of Rs.268.51 crores was neither under any dispute nor under any challenge in the case of the assessee for the assessment year under consideration. Under these facts and circumstances and the impugned order under appeal being u/s 154 of the Act, the contention of the assesee on merits of allowability of deduction u/s 36(1)(viia) based on eligible amount calculated at 7.5% of the total income and 10% of the aggregate average advances of rural branches, irrespective of the provision made in books is not found to be applicable and acceptable. In view of such facts and circumstances of the case and discussion hereinabove, the contentions and submissions of the assessee are not found to be acceptable and are therefore rejected.

7. Against the above order assessee is in appeal before us. We have heard both the parties and perused the record. The claim here is that section 154 order has been passed beyond the limitation of the period. We note that admittedly there was a mistake in the order passed by the AO on 13/10/2010, wherein AO has erroneously allowed excess deduction Rs. 234,53,69,085/- u/s. 36(1)(viia). The assessee itself has earlier actually claimed, the same at a different lower figure. There was no reason for the AO to make this change and this was unquestionably a mistake apparent from a record. Subsequently, the income was assessed u/s. 143(3) r.w.s. 147 of the Act. The income computed with the aforesaid mistake vide order dated 13/10/2010 was carried over in this order of reassessment dated 28/11/2013. Here, we note that Ld.CIT(A) has held that “such mistake which crept in continued even in the order passed on 28/11/2013”. Therefore, he held that “it is the last order where the mistake remained and to that extent, the earlier order got merged with this order”.

Here, we find that this is a concept being expounded by the Ld.CIT(A) that if a mistake has occurred in an order, the same is said to have merged in all the subsequent orders for that assessment year. In this regard, Ld. Counsel of the assessee pleaded that the AO, when he passed the order u/s. 143(3) r.w.s. 147 has never proposed to correct the earlier error. It was reopened for a specific reason. Even in the body of the order AO did not consider this issue of earlier mistake and in the computation, he only started with the income as per the last assessment order dated 13/10/2010. Hence, Ld. Counsel pleaded that by no stretch of imagination, it can be said that the AO while making the reassessment was proposing a correction. Hence, the earlier mistake cannot get 'merged' with this reassessment order.

8. We find that Ld.CIT(A) has passed a cryptic order on this issue. On what principle, he found that the mistake got merged in this order, needs due elaboration in light of the submissions of the Ld. Counsel of the assessee above. The aspects also need actual verification of assessment records. It is settled law that Ld. CIT(A) needs to pass a speaking order. Hence, we remit this issue to the file of Ld. CIT(A). The Ld.CIT(A) shall elaborate how the mistake can be said to have got merged in the reassessment order giving the jurisdiction u/s 154 with reference to a mistake, which actually occurred much earlier. At what stage, the proposal to correct the error was mooted. The Ld.CIT(A) shall give the assessee proper opportunity of being heard and also examining the reassessment and other records. Thereafter, he shall pass an order as per law.

9. As regards that assessee pleading on merits. We find that in a proceeding u/s. 154, the merits of the issue cannot be adjudicated. Moreover, in the order of Tribunal referred by assessee in grounds of appeal the matter was remitted to the file of AO.

10. In the result, this appeal filed by the assesee stands allowed for statistical purpose.

11. Appeal for AY 2008-09. Grounds of appeal read as under :-

On jurisdiction

1.1 The Ld. CIT(A) erred in holding that after decision of Hon'ble Supreme Court in case of Maxopp Investments Ltd. (402 ITR 640), disallowance u/s 14A is automatic in all cases and hence even where disallowance was deleted, on AO being satisfied, based on directions of Hon'ble ITAT, the same constitutes a mistake apparent from records which can be rectified u/s 154.

1.2 The CIT{A) even otherwise failed to appreciate that the disallowance u/s 14A is a highly legal and debatable issue and cannot be a matter of rectification u/s 154 of the Income-tax Act.

On Merits

2.1 The Ld.CIT(A) erred in confirming disallowance u/s Rule 8D{iii) on the ground that income from tax free bonds is not stock in trade and appellant retains control over the investee company for shares without appreciating that as held in various judicial decisions and fortified by CBDT Circular, all securities held by bank constitute stock in trade.

2.2 The Ld. CIT(A) ought to have allowed the claim of appellant based on decision of Hon'ble Supreme Court in case of Maxopp Investments Ltd (402 ITR 640) which had approved the decision of Punjab & Haryana High Court in case of State Bank of Patiala on same set of facts as that of appellant.

12. Brief facts of the case are as under:-

2. The facts of the case in brief are that the ITAT vide ITA No.4578/Mum/2013 & 4842/Mum/2013 dated 18.11.2015, No 7589/Mum/2014 dated 11.08.2016 had directed the AO to decide the issue of disallowance u/s 14A r.w.r. 8D of the Act, deduction u/s 36(1)(viii) & deduction u/s 36(1)(viia) of the Act afresh. Accordingly, after giving effect to the order of ITAT dated 22.12.2017, the AO allowed the disallowance of Rs 23,26,64,86,800/- made u/s 14A r.w.r.8D of the Rules. Thereafter, by issue of notice u/s 154/155 of the Act, the AO afforded an opportunity to the appellant to be heard. AO, after considering the submission of the assessee, decision of Hon'ble Supreme Court in the case of Maxopp Investment Limited vs. CIT and also the order giving effect to the Hon'ble ITAT Order dated 22.12.2017, withdrew the amount allowed as deduction computed u/s 14 of the Act, r.w.r. 8D of Rules and

added the same to the total income of the assessee. Being aggrieved by the action of the AO, the appellant has filed the present appeal against order so passed u/s 154 of the Act.

13. The order of the Ld.CIT(A) on this issue reads as under:-

6.3 I have carefully considered the facts of the case, oral contentions and written submissions of the assessee, discussion of the AO in the rectification order u/s 154 of the Act and material available on record. In respect of assessee's contention that the issue is highly legal and debatable it is stated that once an issue is decided by Hon'ble Supreme Court, the same remains no more debatable in nature. Any issue once decided by Hon'ble Supreme Court attains finality and thereby loses its any of the characteristics of being debatable in nature. There is no dispute to the aspect that the Hon'ble Supreme Court has decided the issue in respect of application of Sec.14A. They, in the said decision have clearly held that the argument relating to 'dominant intention' of the assessee would not be relevant for invoking the provisions Sec.14A of the Act. Accordingly the contention of the assessee that the issue is still debatable is not found to be acceptable.

6.3.1 The assessee in their submission on merits have stated that they have interest free funds aggregating to 27289 crores as against their funds employed in the securities on which tax free income was earned at only Rs.446 crores. Under these facts (subject to the verification by the AO), it is stated that a presumption would come into play that when the investment in tax free assets are less than the interest free funds owned by the assessee, then such investments are to be presumed as if to have been made out of the interest free funds available with the assessee as per the decision of the Bombay High Court in the case of HDFC Bank Ltd. 383 !TR 579. It is seen from the copy of the assessment order that out of the total disallowance made under 14A r.w.r. 8D(2) the AO has made disallowance of Rs.21,25,09,346 under clause(ii) and of Rs.1,89,38,5007-under clause(iii) of Rule 8D(2) of Rules. In view of the facts that the assessee has its own interest free funds far in excess of the investments made in instruments yielding exempt income (subject to verification by the AO), in accordance with the decision of Bombay High Court in the case of HDFC Bank Ltd. (supra) there cannot be any disallowance u/s 14A of the Act in accordance with clause(ii) of Rule 8D(2) of Rules, Subject to the verification by the AO of availability of interest free funds by the assessee being in excess of their investments yielding exempt income, the appellant gets consequential relief.

6.3.2 As regards the disallowance computed as per clause(iii) of Rule 80(2} it is stated that the assessee has earned exempt income to the tune of Rs.54.09 crores during the year under consideration which has been claimed exempt. It is seen from the facts noted at para 6.1. of the assessment order that such exempt income constitutes of income earned on tax free bonds of Rs.47.17 crores and dividend earned to the tune of Rs.6.92 crores. It is seen from the submission of the assessee

that the assessee has entirely devoted its submissions on merits contending that the entire exempt income has been earned from the stocks which are held as stocks in trade and that there were no investments which could be considered to have been made by them. Such submissions of the assessee are found to be factually incorrect, especially in view of the fact that out of the exempt income of Rs.54.09 crores as much as Rs.47.17 crores has been earned from investment in tax free bonds and there cannot be any dispute regarding attributing certain expenses in accordance with Rule 8D in respect of such investments made in tax free bonds and consequent exempt income earned therefrom. As regards the earning of dividend income to the tune of Rs.6.92 crores, it is stated that the assesse is public sector bank. From the case of Maxopp Investment Ltd. it is noted that where the shares are held as stock-in-trade, 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 declared by the investee company that would necessarily be earned by the assessee and the assessee alone, ! find that the appellant, even at the time of investing into the shares, knew that it may generate dividend income as well and as and when such dividend income is generated that would be earned by it. Further, in the facts of the case assessee has not proven that such purchase of equity/securities were purely for the purposes of trading and that it contributed only to their stock in trade. Therefore, I am of the considered opinion that while computing the disallowance u/s.14A read with Rule 8D(2){iii), investment in equity shares should be considered.

6.3.3 The assessee has also placed reliance on the decision of Hon'ble ITAT Delhi in the case of Nice Bombay Transport(P) Ltd. vs. ACIT(OSD), New Delhi in ITA No.1331 of 2012 wherein the Hon'ble ITAT have held where assesee has purchased shares as stock in trade for the purpose of trading and receives dividend, provisions of Sec.14A cannot be invoked. In respect of such decision, it is stated that it is in respect of particular fact of the assessee wherein the assessee was engaged in the business of trading in shares as also interest was paid by the said company on funds borrowed by it for acquiring its stock in trade and had no direct co-relation with the dividend income earned by it. On the contrary, in the case of the assessee, the assessee is a bank undertaking banking business and it is the stated position of the assessee that they have their own funds far in excess of investments made and therefore there is no interest attributable to the earning of such exempt income. Accordingly, the facts are distinguishable.

6.3.4 In view of the facts and circumstances of the case and discussion hereinabove, it is held that the disallowance u/s 14A r.w.r, 8D shall have to be done in the case of the assessee, however, the same is restricted only to be under clause(iii) of the said rule (subject to the verification by the AO) as has been directed hereinabove. Grounds of appeal No.1 & 2 are accordingly partly allowed.

14. Against the above order, assessee is in appeal before us.

15. We have heard both the parties and perused the records. We find that AO has withdrawn, the relief granted u/s. 14A in the assessment order by mentioning that subsequently order of Hon'ble Supreme Court in Maxopp Investment Ltd. 402 ITR 640 has come. Accordingly, he has effectively made the disallowance us/.14A u/s 154 of the Act. We note that the decision of Hon'ble Supreme Court in Maxopp Investment Ltd (supra) did not overrule the proposition that when interest free funds are sufficient still disallowances u/s 8D(ii) needs to be done. Thus, the decision of Hon'ble Bombay High Court in the case of Reliance Industries and HDFC still holds the forte. Furthermore, in the said case of Maxopp Investment Ltd (supra) itself Hon'ble Supreme Court has upheld the Hon'ble Punjab and Haryana High Court decision to the extent that it was held that disallowances u/s. 14A cannot exceed the exempt income. From the above, it is apparent that said decision of Hon'ble Supreme Court in Maxopp Investment Ltd (supra) does not give a carte blanche to withdraw the relief granted u/s 14A. Or in other words that it mandates that without considering these aspects disallowances has to be done. There is no doubt that Hon'ble Supreme Court held that relief granted from disallowances u/s 14A on the plank that the investment being stock in trade cannot be upheld. Hence, no relief can be granted to assessee on this account. But, it is still deserved relief on the other issue for own interest free funds for the purpose of u/s 8D(ii) and restricting the disallowances with that extent exempt income. These cannot be said to be a subject matter of rectification u/s 154. Hence,upon careful consideration, we hold that the disallowance is not coming under the realm for rectification of mistake u/s 154 and the AO order u/s 154 cannot be presumed to have considered these aspects.

16. Hence, we agree with the submissions of the assesse that order passed by the AO is not sustainable as the issue was debatable and it was not liable for rectification of

mistake u/s .154. Hence, we hold that order passed to withdraw the relief granted u/s 14A earlier is bereft of jurisdiction. Hence, we set aside the order of Ld.CIT(A) and decide the issue in favour of the assessee.

17. In the result, both appeals allowed for statistical purpose.

Pronounced in the open court on 13 /08/2021

Sd/-	Sd/-
(AMARJIT SINGH)	(SHAMIM YAHYA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated : 13 /08/2021
Thirumalesh, Sr.PS
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//

(Assistant Registrar)
ITAT, Mumbai