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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ ITA 852/2011

COMMISSIONER OF INCOME TAX Appellant

Through Mr. Kamal Sawhney, Adv.

versus

M/S DCM SHRIRAM CONSOLIDATED LTD Respondent

Through Mr. V.P. Gupta and Mr. Basant
Kumar, Adv.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.V.EASWAR

ORDER

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02.12.2011

The present appeal filed by the Revenue under Section 260A of the Income Tax Act, 1961 (Act, for short) is directed against the order of the Income Tax Appellate Tribunal (for short, the tribunal) dated 14th January, 2011 in the case of DCM Shriram Consolidated Ltd. The appeal relates to assessment year 2006-07.

2. Having heard learned counsel for the parties, the following two substantial questions of law are framed:-

“(i) Whether Rule 8D of the Income Tax Rules is retrospective and applies to the assessment year in question?

(ii) Whether the Income Tax Appellate Tribunal was right in holding that 10% of the expenditure incurred can be estimated as attributable and relating to earning of exempt income under Section 14 A of the Income Tax Act, 1961?”



3. As far as the question No.(i) is concerned, the same has to be answered against the Revenue and in favour of the respondent-assessee in terms of the decision dated 18th November, 2011 in ITA No.687/2009 titled *Maxopp Investment Ltd. Vs. Commissioner of Income Tax, New Delhi* and other cases. It is answered accordingly.

4. The Assessing Officer had noticed that the respondent-assessee had earned dividend income of Rs.1,19,21,922/-, which was exempt under Section 10(38) of the Act. However, the expenditure incurred by the respondent company for the purpose of earning dividend income had not been reduced as required under Section 14A of the Act. Expenditure incurred on earning dividend income was required to be disallowed. The Assessing Officer recorded that the respondent assessee had undertaken multiple activities and expenditure was incurred to carry on business and earning income. He, thereafter, referred to Rule 8D and on the said basis computed disallowance under Section 14A and was quantified at Rs. 91,91,129/-.

5. The aforesaid disallowance was challenged by the assessee before the CIT (Appeals), who held that Rule 8D was retrospective. Accordingly, the appeal filed by the assessee was dismissed.

6. The tribunal in the impugned order referred to the judgment of the Bombay High Court in *Godrej Boyce Mfg. Co. Ltd. Vs. DCIT* (2010) 328 ITR 81 and has held that Rule 8 D was not retrospective



and, therefore, the basis adopted by the Assessing Officer was wrong. Thereafter, the tribunal held that 10% of the exempt income earned can be attributed as expenditure related/incurred for earning of the exempt income. The tribunal relied on the order passed by the Assessing Officer for the assessment year 2005-06.

7. Learned counsel for the respondent-assessee submits that in the present case, an order of remit should not be passed since the tribunal has estimated 10% of the dividend income as sufficient or appropriation disallowance under Section 14A of the Act. We do not agree that this aspect is not required to be examined by the Assessing Officer. There is no justification or reason given by the tribunal as to why it has estimated that 10% of the dividend income can be regarded as expenditure relatable to earning of the exempt income. This 10% figure cannot and is not a thumb rule and disallowance will depend upon facts and circumstances of each case. Tribunal has not examined the reasoning of the Assessing Officer and factual position relating to the Assessment year 2005-06. What has to be disallowed under Section 14A of the Act, has been specifically examined in *Maxopp Investment Ltd. Vs. Commissioner of Income Tax, New Delhi* (ITA 687/2009) and it has held as under:-

“28. It was contended that unless and until there was actual expenditure for earning the exempted income, there could not be any disallowance under



section 14A. While we agree that the expression "expenditure incurred" refers to actual expenditure and not to some imagined expenditure we would like to make it clear that the 'actual' expenditure that is in contemplation under section 14A(1) of the said Act is the 'actual' expenditure in relation to or in connection with or pertaining to exempt income. The corollary to this is that if no expenditure is incurred in relation to the exempt income, no disallowance can be made under section 14A of the said Act.

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42. Thus, the fact that we have held that sub-sections (2) & (3) of section 14A and Rule 8D would operate prospectively (and, not retrospectively) does not mean that the Assessing Officer is not to satisfy himself with the correctness of the claim of the assessee with regard to such expenditure. If he is satisfied that the assessee has correctly reflected the amount of such expenditure, he has to do nothing further. On the other hand, if he is satisfied on an objective analysis and for cogent reasons that the amount of such expenditure as claimed by the assessee is not correct, he is required to determine the amount of such expenditure on the basis of a reasonable and acceptable method of apportionment. It would be appropriate to recall the words of the Supreme Court in *Walfort (supra)* to the following effect:-

"The theory of apportionment of expenditure between taxable and non-taxable has, in principle, been now widened under section 14 A."

So, even for the pre-Rule 8D period, whenever the issue of section 14A arises before an Assessing Officer, he has, first of all, to ascertain the correctness of the claim of the assessee in respect of the expenditure incurred in relation to income which does not form part of the total income under the said Act. Even where the assessee claims that no expenditure has been incurred in relation to income which does not form part of total income, the assessing officer will have to verify the correctness



of such claim. In case, the assessing officer is satisfied with the claim of the assessee with regard to the expenditure or no expenditure, as the case may be, the assessing officer is to accept the claim of the assessee insofar as the quantum of disallowance under section 14A is concerned. In such eventuality, the assessing officer cannot embark upon a determination of the amount of expenditure for the purposes of section 14A(1). In case, the assessing officer is not, on the basis of objective criteria and after giving the assessee a reasonable opportunity, satisfied with the correctness of the claim of the assessee, he shall have to reject the claim and state the reasons for doing so. Having done so, the assessing officer will have to determine the amount of expenditure incurred in relation to income which does not form part of the total income under the said Act. He is required to do so on the basis of a reasonable and acceptable method of apportionment.”

8. Accordingly, we answer question No.(ii) in favour of the Revenue and against the assessee and an order of remit is passed in terms of the directions given in *Maxopp Investment Ltd.*(supra) The Assessing Officer will keep in mind the ratio and observations of this decision while deciding the matter relating to the expenditure, direct or indirect, incurred for earning of the exempt income by the respondent- assessee.

Appeal is disposed of. No costs.


SANJIV KHANNA, J.


R.V.EASWAR, J.

DECEMBER 02, 2011/NA