$~9

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

% *Date of Decision: 06.11.2023*

\+ **ITA 1453/2018**

THE PR. COMMISSIONER OF INCOME TAX -3..... Appellant
Through: Mr Ruchir Bhatia, Sr. Standing Counsel with Ms Deeksha Gupta, Advocate.

versus

DLF HOME DEVELOPERS LTD ..... Respondent
Through: Ms Kavita Jha with Mr Aditeya Bali, Advocates.

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MR JUSTICE GIRISH KATHPALIA
[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (ORAL):

1. This appeal concerns Assessment Year (AY) 2011-12.

2. *Via* the instant appeal, the appellant/revenue seeks to assail the order dated 19.06.2018 passed by the Income Tax Appellate Tribunal [in short, "Tribunal"].

3. According to Mr Ruchir Bhatia, learned senior standing counsel, who appears on behalf of the appellant/revenue, the sole issue that arises for consideration is: whether the Tribunal has erred in deleting the disallowance amounting to Rs. 80,66,72,112/- made by the Assessing Officer (AO) under Section 14A of the Income-tax Act, 1961 [in short, "the Act"] read with Rule 8D of the Income-tax Rules 1962 [in short, "the Rules"]?

4. The record shows that the AO had taken into account the balance sheets of financial years (FY) ending on 31.03.2010 and 31.03.2011. A comparison of the information embedded in the said balance sheets revealed to the AO that the investments made by the respondent/assessee in equity shares at the beginning of the period in issue i.e., FY 2010-11 (AY 2011-12) was Rs. 2,73,331.69 lakhs. It also revealed that at the end of said FY, the investments fell to Rs.1,78,239.36 lakhs.

4.1 Based on this, the AO applied the provisions of Rule 8D(2)(ii) and (iii). Accordingly, under Rule 8D(2)(ii), Rs. 6,946.01 lakhs was disallowed towards interest expenditure, while Rs. 1,128.93 lakhs was disallowed as administrative expenses that would possibly have been incurred to earn exempt income by taking recourse to Rule 8D(2)(iii) read with Section 14A of the Act. In sum, the total amount disallowed by the AO was Rs. 80,66,72,112/, after deducting the *suo motu* disallowance made by the respondent/assessee amounting to Rs. 8,21,883/-.

5. The record discloses that the respondent/assessee carried the matter, in appeal, to the Commissioner of Income Tax (Appeals) [in short, "CIT(A)"]. The CIT(A) deleted the disallowance made under Rule 8D(2)(ii) amounting to Rs. 6,946.01 lakhs while retaining the disallowance made by the AO amounting to Rs. 1,128.93 lakhs under Rule 8D(2)(iii) made towards administrative expenses that would possibly have been incurred to earn exempt income. The reason given by the CIT(A) for retaining the disallowance under Rule 8D(2)(iii) is incorporated in paragraph 7.2 of the order.

5.1 For convenience, the same is extracted hereafter:

"*7.2 The Assessing Officer, has further made the addition of Rs..1128.93*

lacs under Rule 8D(2)(iii) of the Income Tax Rules for the administrative expenses incurred for earning the exempt income. ***I am not in agreement with the appellant's argument that they have not incurred any administrative expenditure on the investment activity. The appellant contended that there is no proximate nexus between earning of dividend income and the expenditure incurred by it. The administrative expenditure has been incurred under different heads but no administrative expenditure has been allocated to the investment portfolio. In my view, there cannot be a concept of free lunch and making or selling the investments cannot be in the nature of any passive activity involving no input.*** *In-fact, in my view*

a) making of investment

b) maintaining or continuing with any investment in a particular share/mutual funds etc. and

c) even the time when to exit from one investment to another,

all these activities are well coordinated and well informed management decisions, involving not only inputs from various sources but it also involves acumen of senior management functionaries whether they sit in Subsidiary company or Holding company. There are incidental administrative expenses on collecting the information, research etc. which helps; in arriving at particular investment decisions and these expenses, relating to earning of the income are embedded in the indirect expenses. The investments made being conscious decisions and having deployment of the funds brings into picture the expenditure by way of cost of funds "invested"."

[Emphasis is ours]

6. Both parties preferred appeals against the orders passed by the CIT(A).

7. *Via* the impugned order dated 19.06.2018, the Tribunal allowed the appeal preferred by the respondent/assessee and dismissed the appeal instituted by the appellant/revenue. It is against this backdrop that the appellant/revenue has preferred the instant appeal.

8. The Tribunal ruled in favour of the respondent/assessee, and thus, deleted the entire addition made by the AO, as noticed above, amounting to Rs. 80,66,72,112/-. The Tribunal has, broadly, given the following reasons for deleting the addition made by AO under Section 14A read with Rule 8D

of the Income-tax Rules, 1962:

(i) First, AO has not disputed the claim made by the respondent/assessee that it had interest-free funds to make investments in the AY in issue.

(ii) Second, the AO had not recorded his dissatisfaction or given reasons concerning the incorrectness of the computation made by the respondent/assessee under Section 14A.

(iii) Third, AO has not recorded his dissatisfaction as to the incorrectness of the claim of the respondent/assessee that it has not it had not incurred any expenditure towards earning interest-free income.

9. In other words, the Tribunal concluded that the respondent/assessee had sufficient interest-free funds available with it to make investments in the AY in issue, insofar as the first aspect is concerned. In support of this conclusion, the Tribunal relied on the judgment of the Bombay High Court rendered in ***CIT-2, Mumbai v. HDFC Bank Ltd.***, (2014) 49 taxmann.com 335 (Bombay).

10. As regards the second reason, the Tribunal relied on the judgment of the Supreme Court rendered in ***Godrej & Boyce Manufacture Company Ltd. v. DCIT*** (2017) 81 taxmann.com 111 (SC) and ***HT Media Limited v. Pr. CIT***, (2017) 85 taxmann.com 113 (Delhi).

11. Mr Bhatia submits that the Tribunal reached an incorrect conclusion. According to him, the AO, having regard to the huge investment made by the respondent/assessee, had rightly taken recourse to Rule 8D to make a disallowance amounting to Rs. 80,66,72,112/ for the reason that this was expenditure incurred concerning income that does not form part of the total income under the Act. It is in this context that Mr Bhatia states that the CIT(A) also erred in law, which is why the appellant/revenue was in appeal

before the Tribunal.

12. Ms Kavita Jha, learned counsel, who appears on behalf of the respondent/assessee, on the other hand, has brought to our notice (something which is not in dispute) that, in the AY in issue, the total exempt-dividend income earned by the respondent/assessee was Rs. 71,71,43,933/-.

12.1 It is pointed out by Ms Jha that out of the aforementioned amount, Rs. 70,52,50,000/- was received by the respondent/assessee from its 100% subsidiary namely DLF Commercial Developers Limited (SEZ Div). The balance amount, Ms Jha points out, was received from the following companies:

Party	Amount of Dividend Income
EIH Limited	Rs. 2,13,217/-
Galaxy Mercantiles Limited	Rs. 1,09,56,994/-
Reliance Communication Limited	Rs. 68,000/-
DLF India Limited	Rs. 4,25,000/-
Kotak Mutual Fund	Rs. 2,30,772/-

13. These figures have, concededly, been extracted from the two balance sheets that the AO examined, and therefore, are not in dispute, even according to Mr Bhatia.

14. Moreover, a comparison of the schedule appended to the balance sheets for FY 2009-10 and FY 2010-11 would show that the investment figure remained static in two of the companies [DLF India Limited and DLF Commerical Developers Limited (SEZ Div)]] i.e., there was no fresh investment made in the period in issue i.e., FY 2010-11 (AY 2011-12). The investments in DLF India Limited and DLF Commercial Developers

Limited amounted to Rs. 5,00,000/- and Rs. 100,75,00,000/-, respectively. However, the change *vis-à-vis* the other companies is reflected hereafter:

Party	**Amount of Investments as of 31/03/2011**	**Amount of Investments as of 31/03/2010**
EIH Limited	Rs. 1,43,56,625/-	Rs. 2,15,17,000/-
Galaxy Mercantiles Limited	Rs. 70,94,93,400/-	Rs. 83,90,41,500/-
Reliance Communication Limited	Rs. 80,16,000/-	Rs. 1,36,56,000/-
Kotak Mutual Fund	-	-

15. The argument, therefore, advanced by Ms Jha was that a substantial part of the exempt dividend income i.e., Rs. 70,950,000/- out of Rs. 71,71,43,933/- was on account of investment made in the preceding period, and therefore, in substance, no substantial expenses had been incurred to earn the said exempt dividend income.

16. Furthermore, Ms Jha's contends that apart from the reason given by the Tribunal, that the respondent/assessee had available with it interest-free funds more than the investment made, the AO should have indicated its dissatisfaction as to why the *suo motu* disallowance made by the respondent/assessee, amounting to Rs. 8,21,883/-, was not tenable, having regard to its accounts.

17. According to Ms Jha, this was an exercise that the AO was required to carry out before triggering the provisions of Rule 8D. In support of this plea, Ms Jha relied on the judgment of the coordinate bench of this court rendered in ***Coforge Ltd. v. ACIT*** (2021) 128 taxmann.com 99 (Delhi). The observations made in paragraphs 12.6 to 13.4 are relevant to note:

"*12.6. To understand this line of reasoning, it would be apposite to extract the relevant part of Section 14A of the Act.*

> *"[Expenditure incurred in relation to income not includible in total income.*
> *14A. [(1)] For the purposes of computing the total income under this Chapter, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to86 [sic] income which does not form part of the total income under this Act.]*
> *[(2) The Assessing Officer shall determine the amount of expenditure incurred in relation to such income which does not form part of the total income under this Act in accordance with such method as may be prescribed, if the Assessing Officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under this Act.*
> *(3) The provisions of sub-section (2) shall also apply in relation to a case where an assessee claims that no expenditure has been incurred by him in relation to income which does not form part of the total income under this Act :]*
> *[Provided that nothing contained in this section shall empower the Assessing Officer either to reassess under section 147 or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under section 154, for any assessment year beginning on or before the 1st day of April, 2001.]"*

12.7. A careful perusal of Section 14A(2) of the Act would show that the AO is required to make a determination of the expenditure incurred, concerning the income which does not form part of the total income, if the AO is not satisfied, having regard to the accounts of the assessee, as to the correctness of claims made by the assessee about such expenditure.

12.8. Sub-section 3 of Section 14A of the Act makes it clear that the parameters stipulated in the said provision will also apply where the assessee claims that no expenditure has been incurred by him concerning income that doesn't form part of the total income under the Act.

13. Therefore, what emerges is, if the assessee claims a certain amount of expenditure was incurred by him to earn the income which does not form part of the total income, the AO is required to examine the accounts, and thus, satisfy himself as to the correctness of the claim made by the assessee about the expenditure incurred in that regard. It is when an AO is not satisfied as to the correctness of the claim made by the assessee, about the expenditure said to have been incurred by him on such income which does not form part of

the total income under the Act, he then proceeds to determine the amount of expenditure, by following such method as is prescribed, i.e., Rule 8D of the Rules.

13.1. This methodology, as envisaged under Rule 8D of the Rules, is required to be followed even where the assessee claims that no expenditure was incurred by him concerning income which does not form part of the total income under the Act.

13.2. The approach of the Tribunal has been that, since a disallowance was made, it follows logically, that the AO was not satisfied. This, according to us, is not what is envisaged under the provisions of Section 14A of the Act. The satisfaction has to be arrived at by the AO having regard to the assessee's accounts and not otherwise. Concededly, there is nothing in the record to suggest that the AO examined the accounts from this perspective.

13.3. Furthermore, in our view, because the appellant/assessee had itself offered an amount which could be disallowed under Section 14A of the Act, the onus shifted onto the revenue to ascertain, after examination of the accounts, as to whether or not the appellant's/assessee's claim was correct. It is only after the aforesaid exercise was conducted, could the AO have taken recourse to the prescribed method i.e. Rule 8D of the Rules, for determining the expenditure, which, according to him, needed to be disallowed under Section 14A of the Act.

13.4. We would assume, for the moment, that the revenue could take recourse to Rule 8D of the Rules in both AYs, i.e. 2007-2008 and 2008-2009, although, as indicated above, it could have been triggered perhaps only in AY 2008-2009."

[Emphasis is ours]

18. Having heard learned counsel for the parties, according to us, reasons given by the Tribunal in deleting the disallowance are unimpeachable. The facts, as noted above, are not in dispute. Concededly, the interest-free funds available to the respondent/assessee were more than the investments made in the AY in issue. Furthermore, as noted by the Tribunal, the AO had not

recorded his dissatisfaction [having regard the accounts of the respondent/assessee] before discarding the *suo motu* disallowance made by the respondent/assessee and triggering disallowance *qua* the respondent/assessee. This issue is no longer *res integra* insofar as this court is concerned. [*See* Coforge Ltd. case]

19. Before concluding, we may also note that the record shows that a coordinate bench of this court, on 14.12.2018, had ruled that insofar as the deletion of Rs.3,46,46,421/-, on account of non-refundable golf club membership fee, was concerned, the said issue was covered against the appellant/revenue by the decision dated 30.03.2012 passed in ITA 180/2012, in the case concerning DLF Commercial Ltd. The court also noted that the Special Leave Petition (SLP) filed against the said decision had been dismissed.

20. In view of the above, according to us, no substantial question of law arises for our consideration. The appeal is, accordingly, closed.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

NOVEMBER 6, 2023/ tr