IN THE INCOME TAX APPELLATE TRIBUNAL
"J" Bench, Mumbai

Before Shri B. Ramakotaiah, Accountant Member
& Shri Vivek Varma, Judicial Member

ITA No.7858/Mum/2011
(Assessment year: 2008-09)

JK Investors (Bombay) Ltd, New Hind House, Narottam Morajee Marg, ballard Estate, Fort, Mumbai 400001 PAN: AAACJ 2089 D	Vs.	ACIT (OSD), Circle 2(2), Aayakar Bhavan, Room No.545, 5th Floor, MK Road, Mumbai 400020
(Appellant)		**(Respondent)**

ITA No.7851/Mum/2011
(Assessment year: 2008-09)

ACIT (OSD), Circle 2(2), Aayakar Bhavan, Room No.545, 5th Floor, MK Road, Mumbai 400020	Vs.	JK Investors (Bombay) Ltd, New Hind House, Narottam Morajee Marg, ballard Estate, Fort, Mumbai 400001 PAN: AAACJ 2089 D
(Appellant)		**(Respondent)**

Department by: Shri Manish Konje, DR
Assessee by: Shri Nitesh Joshi
& Shri HiteshTrivedy

Date of Hearing: 28/01/2013
Date of Pronouncement: 13/03/2013

O R D E R

Per B. Ramakotaiah, A.M.

These are the cross apeals filed by assessee and the Revenue against the orders of the CIT (A)5 Mumbai dated 16.08.2011.

ITA No.7858/Mum/2011

2. Ground No.1 pertains to the disallowance of ₹.83,58,230/- under section 14A r.w. Rule 8D of the Income Tax Rules, 1962.

3. The facts as reproduced in the assessment order are that assessee had received dividend income of ₹.8,14,27,436 and interest on mutual funds at ₹.24,66,504 which assessee claimed as exempt

under section 10(38) & 10(35). Since assessee had claimed the two incomes as exempt, AO sought to invoke section 14A and compute the disallowance as per Rule 8D of the Income Tax Rules and asked for assessee's comments. Assessee vide letter dated 24.09.2010 submitted:

> *"It is submitted that in the computation of income, we have disallowed the following expenses under section 14A which relates to exempted income.*
>
> 1. *Interest on loans for buying shares ₹.1,52,38,592*
> 2. *Demat charges ₹.2,96,018*
> 3. *Out of common administrative expenses ₹.10,000*
>
> *We hereby submit that our expenses in respect of exempted income are mainly of interest. During the year total interest payment was of ₹.2,02,00,988. Out of which ₹.1,52,38,592 relates to the investment made in shares. Therefore, Rule 8D is not applicable in our case since besides the above expense no other expenses are required to be incurred for the investment made".*

From the submissions made before AO, assessee claimed to have disallowed ₹.1,52,38,592, ₹.2,96,018 and ₹.10,000.

4. AO on considering the submissions, objected to the quantum of ₹.10,000 as administrative expenses, because, according to him, on investment of ₹.202,25,40,632 even Portfolio Management Service Companies (PMS) would have charged fee @ 2%. He, therefore, invoked Rule 8D of the Income Tax Rules and computed the disallowance of ₹.2,39,02,840 from which he deducted expenses already written back by assessee at ₹.1,55,44,610 (₹.1,52,38,592 + ₹.2,96,018) and made a further disallowance of ₹.83,58,230 being the balancing figure (₹.2,39,02,840 – ₹.1,55,44,610).

5. Assessee took the issue before the CIT (A) who sustained the disallowance made by AO, placing reliance on the decision of Hon'ble Bombay High Court in the case of Godrej & Boycee Mfg. Co. Ltd vs. DCIT reported in 328 ITR 81.

6. Before us, the AR reiterated his submissions before the Revenue authorities and submitted that AO triggered the disallowance placing parity on PMS, which according to assessee

was in complete infirmity, because the receipt of income by assessee was either from group companies on five dividend warrants received and the dividend on mutual funds which was on reinvestment basis and one dividend was through ECS. The Authorized Representative, therefore, submitted that neither of the Revenue authorities went into the entire fact. Even the CIT (A) except for placing reliance on the jurisdictional High Court decision on the issue at large, did not give any finding.

7. The learned AR while making submissions, referred to the decision of the Godrej & Boyce Mfg. Co. Ltd vs. DCIT (supra) and submitted that the Hon'ble Bombay High Court while adjudicating on the views of the impugned Rule and upholding the procedure, also gave detailed comments on the examination of the factum and correctness of the disallowance claimed by assessee and that AO must give reasons for not accepting the computation made by assessee. The AR submitted that the details of receipt of dividend and interest was before the Revenue authorities, which is given below:

S.No	Date	Name of the company	Mode of dividend	Amount (₹.)
1	19.06.07	Raymond Ltd	Dividend warrant	6,56,19,800
2	20.06.07	Raymond Ltd	Dividend warrant	1,48,35,240
3	29.06.07	JK Investo Trade (India) Ltd	Dividend warrant	9,56,575
4	02.08.07	JK Lakshmi Cement Ltd	Dividend warrant	7,900
5	25.09.07	JK Cement Ltd	Dividend warrant	21
6	13.02.08	JK Lakshmi Cement	Dividend warrant	7,900
7	Various dates	Income from mutual fund	Dividend reinvestment	24,66,504
	Total			**8,38,93,940**

8. From the above details, he pointed out that so far as dividend of ₹.6,56,19,800 is concerned, it was credited in Bank through ECS, then there were five dividend warrants received at S.Nos.2-6 and then there was dividend reinvestment from mutual funds. AO

therefore, submitted that there was no reason to target ₹.10,000 debited as administrative expenses to re-compute the disallowance invoking Rule 8D.

9. The learned AR also pointed out from the short submission placed in the paper book wherein it was submitted that the investment did not change in character and that the entire holding is old and primarily for securing controlling interest over those companies. The AR therefore, submitted that disallowance made by AO was on erroneous facts.

10. The learned DR placed reliance on the observations of the Revenue authorities.

11. We have heard the arguments of the parties and have perused the material placed before us. The issue as carved out by the AR is with respect to ₹.10,000 only, but on the contrary, the issue before us is on the applicability of Rule 14A and computation of disallowance as per Rule 8D. The relevant portion read out by the AR from the decision in the case of Godrej & Boyce Mfg. Co. Ltd vs. DCIT (supra) in Para 70 of the order pertains to the correctness of computation of disallowance and giving valid reasons for such computation. The crux of argument of AR is with reference to Section 14(2) which is as under:

> *"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 AO having regard to the accounts of assessee, is not satisfied with the correctness of the claim of assessee in respect of such expenditure in relation to income which does not form part of the total income under this Act".*

The words that need reference in the section are *"if AO having regard to the accounts of assessee, is not satisfied with the correctness of the claim…"* means that before going to the computation, AO has to cross the barrier of the satisfaction with the correctness of the claim, then AO can be permitted to straightaway apply the computation under Rule 8D.

12. Thus the issue in this appeal is with reference to invoking of provisions of section 14A(2) and Rule 8D. The Hon'ble Bombay High Court while upholding the constitutional validity of the section 14A and Rule 8D has this to observe with reference to sub section 2 & 3 of section 14A:

> "*Sub-sections (2) and (3) of section 14A were inserted by an amendment brought about by the Finance Act of 2006 with effect from April 1, 2007. Under sub-section (2), the Assessing Officer is required to determine the amount of expenditure incurred by an assessee in relation to such income which does not form part of the total income under the Act in accordance with such method as may be prescribed. Sub-section (2) was inserted so as to provide a uniform method applicable where the Assessing Officer is not satisfied with the correctness of the claim of the assessee. Parliament has provided an adequate safeguard to the invocation of the power to determine the expenditure incurred in relation to the earning of non-taxable income by adoption of the prescribed method.* ***The invocation of the power is made conditional on the objective satisfaction of the Assessing Officer in regard to the correctness of the claim of the assessee, having regard to the accounts of the assessee. These safeguards which are implicit in the requirements of fairness and fair procedure under article 14 must be observed by the Assessing Officer when he arrives at his satisfaction under sub-section (2) of section 14A. Sub-rule (1) of rule 8D of the Income-tax Rules, 1962, has also incorporated the essential requirements of sub-section (2) of section 14A before the Assessing Officer proceeds to apply the method prescribed under sub-rule (2)" .. (****emphasis supplied)*

13. The same opinion was expressed by the Hon'ble Delhi High Court in the case of Maxopp Investment Ltd and Others v. CIT 247 CTR 162 wherein reliance was placed on the decision of the Hon'ble Supreme Court in the case of CIT vs. Walfort Share & Stock Brokers Pvt. Ltd 326 ITR 1 (SC) and the decision of the Hon'ble Bombay High Court in the case of Godrej and Boyce Company Ltd vs. DCIT (328 ITR 81). The relevant portions of the judgment of Hon'ble Delhi High Court are as under:

29. Sub-section (2) of Section 14 A of the said Act provides the manner in which the Assessing Officer is to determine the amount of expenditure incurred in relation to income which does not form part of the total income. However, if we examine the provision carefully, we would find that the Assessing Officer is required to determine the amount of such expenditure only 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 the said Act. In other words, the requirement of the Assessing Officer embarking upon a determination of the amount of expenditure incurred in relation to exempt income would be triggered only if the Assessing Officer returns a finding that he is not satisfied with the correctness of the claim of the assessee in respect of such expenditure. Therefore, the condition precedent for the Assessing Officer entering upon a determination of the amount of the expenditure incurred in relation to exempt income is that the Assessing Officer must record that he is not satisfied with the correctness of the claim of the assessee in respect of such expenditure. Sub-section (3) is nothing but an offshoot of sub-section (2) of Section 14A. Sub-section (3) applies to cases where the assessee claims that no expenditure has been incurred in relation to income which does not form part of the total income under the said Act. In other words, sub-section (2) deals with cases where the assessee specifies a positive amount of expenditure in relation to income which does not form part of the total income under the said Act and sub-section (3) applies to cases where the assessee asserts that no expenditure had been incurred in relation to exempt income. In both cases, the Assessing Officer, if satisfied with the correctness of the claim of the assessee in respect of such expenditure or no expenditure, as the case may be, cannot embark upon a determination of the amount of expenditure in accordance with any prescribed method, as mentioned in sub-section (2) of Section 14A of the said Act. It is only if the Assessing Officer is not satisfied with the correctness of the claim of the assessee, in both cases, that the Assessing Officer gets jurisdiction to determine the amount of expenditure incurred in relation to such income which does not form part of the total income under the said Act in accordance with the prescribed method. The prescribed method being the method stipulated in Rule 8D of the said Rules. While rejecting the claim of

the assessee with regard to the expenditure or no expenditure, as the case may be, in relation to exempt income, the Assessing Officer would have to indicate cogent reasons for the same.

Rule 8D.

30. As we have already noticed, sub-section (2) of Section 14A of the said Act refers to the method of determination of the amount of expenditure incurred in relation to exempt income. The expression used is - "such method as may be prescribed". We have already mentioned above that by virtue of Notification No.45/2008 dated 24/03/2008, the Central Board of Direct Taxes introduced Rule 8D in the said Rules. The said Rule 8D also makes it clear that where the Assessing Officer, having regard to the accounts of the assessee of a previous year, is not satisfied with (a) the correctness of the claim of expenditure made by the assessee; or (b) the claim made by the assessee that no expenditure has been incurred in relation to income which does not form part of the total income under the said Act for such previous year, the Assessing Officer shall determine the amount of the expenditure in relation to such income in accordance with the provisions of sub-rule (2) of Rule 8D. We may observe that Rule 8D(1) places the provisions of Section 14A(2) and (3) in the correct perspective. As we have already seen, while discussing the provisions of Sub-sections (2) and (3) of Section 14A, the condition precedent for the Assessing Officer to himself determine the amount of expenditure is that he must record his dissatisfaction with the correctness of the claim of expenditure made by the assessee or with the correctness of the claim made by the assessee that no expenditure has been incurred. It is only when this condition precedent is satisfied that the Assessing Officer is required to determine the amount of expenditure in relation to income not includable in total income in the manner indicated in sub-rule (2) of Rule 8D of the said Rules.

31.It is, therefore, clear that determination of the amount of expenditure in relation to exempt income under Rule 8D would only come into play when the Assessing Officer rejects the claim of the assessee in this regard. If one examines sub-rule (2) of Rule 8D, we find that the method for determining the expenditure in relation to exempt income has three components. The first component being the amount of expenditure directly relating to income which does not form part of the total income. The second component

being computed on the basis of the formula given therein in a case where the assessee incurs expenditure by way of interest which is not directly attributable to any particular income or receipt. The formula essentially apportions the amount of expenditure by way of interest [other than the amount of interest included in clause (i)] incurred during the previous year in the ratio of the average value of investment, income from which does not or shall not form part of the total income, to the average of the total assets of the assessee. The third component is an artificial figure - one half percent of the average value of the investment, income from which does not or shall not form part of the total income, as appearing in the balance sheets of assessee, on the first day and the last day of the previous year, It is the aggregate of these three components which would constitute the expenditure in relation to exempt income and it is this amount of expenditure which would be disallowed under section 14A of the said Act. It is, therefore, clear that in terms of the said Rule, the amount of expenditure in relation to exempt income has two aspects – (a) direct and (b) indirect. The direct expenditure is straightaway taken into account by virtue of clause (i) of sub-rule (2) of Rule 8D. The indirect expenditure, where it is by way of interest, is computed through the principle of apportionment, as indicated above, and, in cases where the indirect expenditure is not by way of interest, a rule of thumb figure of one half percent of the average value of the investment, income from which does not or shall not form part of the total income, is taken.

……

41. Sub-section (2) of section 14A, as we have seen, stipulates that the Assessing Officer shall determine the amount of expenditure incurred in relation to income which does not form part of the total income "in accordance with such method as may be prescribed". of course, this determination can only be undertaken if the Assessing Officer is not satisfied with the correctness of the claim of the assessee in respect of such expenditure. This part of section 14A(2) which explicitly requires the fulfillment of a condition precedent is also implicit in section 14A(1) [as it now stands] as also in its initial avatar as section 14A. It is only the prescription with regard to the method of determining such expenditure which is new and which will operate prospectively. In other words, section 14A, even prior to the introduction of sub-sections (2) and (3) would require the assessing

officer to first reject the claim of the assessee with regard to the extent of such expenditure and such rejection must be for disclosed cogent reasons. It is then that the question of determination of such expenditure by the assessing officer would arise. The requirement of adopting a specific method of determining such expenditure has been introduced by virtue of sub-section (2) of section 14A. Prior to that, the assessing was free to adopt any reasonable and acceptable method.

14. The Hon'ble Punjab & Haryana High Court in the case of CIT vs. Hero Cycles Ltd 323 ITR 518 (P&H) has also held that disallowance under section 14A could not stand where it was found that for earning exempted income no expenditure has been incurred:

"Held - dismissing the appeal, that the expenditure on interest was set off against the income from interest and the investment in the shares and funds were out of the dividend proceeds. In view of this finding of fact, disallowance under section 14A was not sustainable. Whether, in a given situation, any expenditure was incurred which was to be disallowed, was a question of fact. The contention of the Revenue that directly or indirectly some expenditure was always incurred which must be disallowed under section 14A and the impact of expenditure so incurred could not be allowed to be set off against the business income which may nullify the mandate of section 14A, could not be accepted. Disallowance under section 14A required finding of incurring of expenditure and where it was found that for earning exempted income no expenditure had been incurred, disallowance under section 14A could not stand. Consequently, the disallowance was not permissible.

15. The Coordinate Bench in the case of Justice Sam P Bharucha vs. Addl. CIT in ITA No.3889/Mum/2011 dated 25.07.2012 has analyzed similar issue and came to the following conclusion:

"5 We have considered the rival submissions as well as relevant material on record. Section 14A has within it implicit notion of apportionment in the cases where the expenditure is incurred for the composite/indivisible activities in which taxable and non-taxable income is received. But when it is possible to determine the actual expenditure in relation to the exempt income or when no expenditure has been incurred in relation to the exempt

income, then principle of apportionment embedded in section 14 A has no application. The objective of section 14 A is not allowing to reduce tax payable on the normal exempt income by debiting the expenditure incurred to earn the exempt income. Thus, the expenses incurred to earn exempt income cannot be allowed and the expenses shall be allowed only to the extent they are related to the earning of taxable income. If there is expenditure directly or indirectly incurred in relation to exempt income, the same cannot be claimed against the income, which is taxable as it is held by the Hon'ble Supreme Court in case of Commissioner of Income-tax v. Walfort Share and Stock Brokers P. Ltd. reported in 326 ITR 1 that for attracting the provisions of section 14 A, there should be proximate cause for disallowance which as relationship with the tax exempt income.

5.1 The expenditure incurred in relation to the income which does not form part of total income has to be disallowed. However, it should be proximate relationship between the expenditure and the income, which does not form part of total income. Once such proximity relationships exist, the disallowance is to be effected. In case the assessee had claimed that no expenditure has been incurred for earning the exempt income, it was for the assessing officer to determine as to whether the assessee had incurred any expenditure in relation to income which did not form part of total income and if so to quantify the extent of disallowance. Thus, in order to disallow the expenditure under section 14A, there must be a live nexus between the expenditure incurred and the income not forming part of total income. No notional expenditure can be apportioned for the purpose of earning exempt income unless there is an actual expenditure in relation to earning the income not forming part of total income. If the expenditure is incurred with a view to earn taxable income and there is apparent dominant and immediate connection between the expenditure incurred and taxable income, then no disallowance can be made under section 14A merely because some tax exempt income is received by the assessee.

5.2 Averting to the facts of the case in hand, the assessee had made a claim that no expenditure has been incurred or claimed for earning the exempt income.

From the details of the expenditure, it is clear that the expenditure incurred and claimed by the assessee has direct nexus with the professional income of the assessee. It is not the case of the revenue that the assessee has used his official machinery and Establishment for earning the exempt income. The

Assessing Officer has not given any finding that any of the expenditure incurred and claimed by the assessee is attributable for earning the exempt income. In other words when the assessing officer has not pointed out that certain expenditure is not incurred for earning the professional income; but are incurred in relation to dividend income or such expenditure is incurred for inseparable and indivisible activities comprising professional as well as the activities on which is exempt income has been earned by the assessee, then in the absence of any such instance of expenditure, finding of Assessing Officer or any material to show that the expenditure incurred and claimed by the assessee against the taxable income has any relation for earning the exempt income, the provisions of section 14A cannot be applied.

5.3 In the case of Shri Pawan Kumar Parameshwar Lal vs. ACIT (supra) this tribunal has considered and decided an identical issue in Para 4 as under:

> *"4. After hearing the assessee in person and arguments of the learned D.R. we are of the opinion that no disallowance is called for under section 14A. Obviously the assessee is maintaining separate books of account for purpose of business and these investments are in his personal capacity. The A.O. also has not disallowed any expenditure of personal nature out of the income from business or profession in the computation of income in the assessment order. In view of this, we are of the opinion that the expenditure claimed in the business of share dealings cannot be correlated to the incomes earned in personal capacity that too on dividend, PPF interest and tax free interest on RBI bonds. In view of this, we are of the opinion that estimation of expenditure of ₹.20,000/- out of business expenditure claimed in business activity cannot be considered for being incurred for this earning of tax free income of above nature. In view of this disallowance so made under section 14A of ₹.2O,OOO/- is deleted. Not only that the CIT(A) directed the A.O. to consider the allowance invoking Rule 8D. The Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. vs. DCIT 328 ITR 81 has considered Rule 8D to be applicable prospective and since the assessment year involved is before the introduction of sub-*

section (2) & (3) of section 14A, there is no question of disallowing the amounts invoking Rule8D. Therefore, the CIT(A)'s direction on this is set aside and the additions so made by the A.O. in the computation of business income is deleted. Ground is considered allowed."

5.4 Similarly in case of Auchtel Products Ltd (supra), it was held by this Tribunal in Para 15 has under:

"15. A bare perusal of the above provisions disallowable as per Rule 8D, if he, "is not satisfied with the correctness of the claim of the assessee" in respect of such expenditure in relation to exempt income. Even if the assessee claims that no expenditure was incurred in respect of exempt income, the AO is supposed to follow the mandate of Rule 8D if he is not satisfied with the correctness of the assessee's claim. To put it simply, the further disallowance u/s.14A is called for when the AO is not satisfied with the assessee's claim of having incurred no expenditure or some amount of expenditure in relation to exempt income. Satisfaction of the AO as to the incorrect claim made by the assessee in this regard is sine qua non for invoking the applicability of Rule 8D. Such satisfaction can be reached and recorded only when the claim of the assessee is verified. If the assessee proves before the AO that it incurred a particular expenditure in respect of earning the exempt income and the AO gets satisfied, then there is no requirement to still proceed with the computation of amount disallowable as per Rule 8D. From the assessment order, it is observed that the AO simply kept the assessee's submissions on record without appreciating as to whether these were correct or not. He proceeded on the premise as if the disallowance as per Rule 8D is automatic irrespective of the genuineness of the assessee's claim in respect of expenses incurred in relation to exempt income. It is an incorrect course adopted by the AO. The correct sequence, in our considered opinion, for making any disallowance u/s. 14A is to, firstly, examine the assessee's claim of having incurred some expenditure or no expenditure in relation to exempt income, If

> *the AO gets satisfied with the same, then there is no need to compute disallowance as per Rule 8D. It is only when the AO is not satisfied with the correctness of the claim of assessee in respect of such expenditure or no expenditure having been incurred in relation to exempt income, that the mandate of Rule 8D will operate. In the instant case, the authorities below have directly gone to the second stage of computing disallowance u/s. 14A as per Rule 8D without rendering any opinion on the correctness or otherwise of the assessee's claim in this regard. We, therefore, set aside the impugned order on this issue and restore the matter to the file of AO to re-compute disallowance, if any, in accordance with our above observations after duly examining the assessee's claim in this regard."*
>
> *6 In view of the above discussion and facts and circumstances of the case, we are of the considered opinion that no disallowance under section 14A is called for when the assessee has not incurred and claimed any expenditure for earning the exempt income.*

16. Similar views were also expressed by the Coordinate Benches in the case of Relaxo Footwears Ltd, vs. Addl. CIT (2012) 50 SOT 102 and Priya Exhibitors (P) Ltd vs. ACIT (2012) 54 SOT 356. In the case of Relaxo Footwears Ltd, it was held as under:

> "*The Assessing Officer should have considered the claim of the assessee that no expenditure has been incurred in relation to earning the exempt income. If the claim was not found to be in consonance with the facts on record, it could have been rejected and disallowance could have been made as per rule 8D. However, it is found that the Assessing Officer has not considered the claim of the assessee at all and he has straightway embarked upon computing disallowance under rule 8D. The Commissioner (Appeals) made an assumption that whenever exempt income is earned there will be some expenditure incurred in relation thereto. Such presumption cannot form the basis for making disallowance under rule 8D."*

17. In the case of Priya Exhibitors (P) Ltd vs. ACIT (2012) 54 SOT 356 it was held as under:

> "*From the careful study of the observations made by the Bombay High Court in the case of* Godrej & Boyce Mfg.

> Co. Ltd. *(*supra*), it is apparent that first the Assessing Officer has to determine the claim of the assessee regarding expenses which neither the Assessing Officer nor the Commissioner (Appeals) has done in the instant case. In fact, the said decision goes against the department itself in so far as their Lordships has held that the Assessing Officer must in the first instance determine whether the claim of the assessee is correct and determination must be made having regard to the accounts of the assessee. The Legislature directs him to follow rule 8D only where the Assessing Officer is not satisfied with the claim of assessee. "*

18. After considering the principles laid down by various judgments, it is imperative that the Assessing Officer can invoke Rule 8D only when he records satisfaction in regard to the correctness of the claim of the assessee, having regard to the accounts of the assessee. The condition precedent for the Assessing Officer entering upon a determination of the amount of the expenditure incurred in relation to exempt income is that the Assessing Officer must record that he is not satisfied with the correctness of the claim of the assessee in respect of such expenditure. While rejecting the claim of the assessee with regard to the expenditure or no expenditure, as the case may be, in relation to exempt income, the Assessing Officer would have to indicate cogent reasons for the same. Therefore, it is all the more necessary that AO has to examine the accounts of assessee first and then if he is not satisfied with the correctness of the claim, only he can invoke Rule 8D. No such examination was made or satisfaction was recorded by AO in this case. It was noticed that the Assessing Officer has not considered the claim of the assessee at all and he has straightway embarked upon computing disallowance under Rule 8D on the presumption that port folio management involves atleast 2% of charges. Disallowance under section 14A required finding of incurring of expenditure and where it was found that for earning exempted income no expenditure had been incurred, disallowance under section 14A could not stand. We notice that assessee itself disallowed the interest which is directly applicable, Dmat charges and administrative exp on estimation

totaling to Rs.1,55,44,610. Assessee is a hundred crore turnover company. Ao has not examined any expenditure claimed in P& L account so as to relate to exempt income, nor gave afinding that assessee claim is not correct for any reason. Rule 8D can not be invoked directly without satisfying about the claims or otherwise. Consequently, the disallowance was not permissible. We therefore, allow the ground of appeal.

19. Ground No.2 pertains to disallowance of ₹.18,92,784 under section 40(a)(ia) of the Income Tax Act.

20. From the facts as submitted by the AR, it is understood that an ex-employee of Raymond Ltd rendered services to assessee to whom Raymond Ltd paid professional fee. These payments were sought to be reimbursed by Raymond Ltd. from the assessee by raising debit notes against the assessee, which was paid to Raymond Ltd. as and when the debit notes were raised on the assessee.

21. These facts were submitted before the revenue authorities, who rejected the same and held them to be payment in lieu of profession fee and invoked section 40(a)(ia), because according to section 194J, the assessee was required to deduct tax at source.

22. Before us, the AR produced the complete set of TDS certificates issued by Raymond Ltd. to Mr. Dinesh Kumar and complete set of Debit Notes raised by Raymond Ltd. on the assessee.

23. On going through all the documents, whose existence and submission before the revenue authorities was not questioned by the DR, we are of the view that this is a case of reimbursement of amount paid to Raymond Ltd. who made payment to Mr. Dinesh Kumar, which has no income element in so far as the recipient, i.e. Raymond Ltd. is concerned. TDS provisions can only be invoked if a receipt by the recipient from the payer has an element of generation of income. If the element of income cannot be

established, in our considered opinion provisions of section 40(a)(ia) cannot be invoked.

24. With these observations, we set aside the order of the CIT(A) on this issue and direct the AO to delete the disallowance. Ground no. 2 is, therefore, allowed.

25. Ground no. 3 pertains to professional fee of ₹10,71,468 paid to Mahajan & Aibara.

26. The undisputed facts are that the assessee wanted to establish an Aviation Academy, for which the vendor herein, M/s Mahajan & Aibara, charged the assessee a sum of ₹10,71,468 for the preparation of feasibility report on the project. This project, though initiated was aborted. According to the AO the expense was disallowed because it was not wholly and exclusively incurred for the purpose of the business and assessee preferred not to furnish any submissions on the issue.

27. From the impugned order, we find that even before the CIT(A), the assessee chose not to furnish any details with regard to the justification of allowance of the expense, except for a bald submission.

28. The AR placed reliance on the decision of CIT vs. Coromandal Fertilizers, reported in 247 ITR 417 (AP), wherein the Hon'ble Andhra Pradesh High Court has held as under:

> *"{iii] That the feasibility report submitted by Tata Sons had not resulted in establishing a new unit. The object of this expenditure incurred by the assessee and the amount paid to Apex Geological Service Pvt. Ltd. was effective utilization of the surplus funds of the existing business and to explore avenues for investment of such funds. In other words, the assessee had utilized its surplus funds for the purpose of putting it to effective and profitable use. Therefore, it was wholly connected with its existing business and it was wholly and exclusively incurred for the purpose of carrying on its existing business. There was nexus between the expenditure incurred and the business it was carrying on and hence the expenditure was an allowable expenditure under section 37 of the Act".*

29. Placing reliance of the above decision, he submits that the expense was meant for expansion of business, which ultimately had to be aborted. Nevertheless, since the expanse *was* for the purpose of business, it had to be allowed.

30. The DR placed his reliance on the decision of the revenue authorities.

31. We have heard the rival contentions. Though the AR has placed reliance on the decision of Coromandal Fertilizers *(supra)* and explained the importance of the word *"nexus"* with the business expediency, we cannot accept that in the present set of circumstances. Before the revenue authorities, the assessee did not make any effort to establish the seriousness and genuineness of the project and expense incurred thereon. Merely making a statement that a feasibility report was got prepared for a proposed line of business, which finally was aborted, cannot qualify for the allowance of an expense, because, the first onus is on the assessee to establish the correctness and genuineness of the expense claimed, which according to our considered opinion, the assessee has failed. In these circumstances, we cannot accept the arguments of the AR. We, therefore, sustained the disallowance of ₹10,71,468/. Ground no. 3, is therefore, rejected.

32. Ground no. 4 pertains to the charge of interest under section 234C.

33. AR submitted that the AO levied interest on assessed income where as section permits only on returned income. According to the AR, the interest, if at all, has to be charged on shortfall computed in each quarter. He demonstrated the infirmity on the part of the AO by placing the copies of computation of income and computation as made out by the AO and submitted that the AO has computed the interest on the total paid taxes of Rs. 8,58,07,397/-. When the issue was taken up before the CIT(A), the CIT(A) held, *«charging of interest* is *mandatory. However, the interest being consequential in nature, the AO* is *directed to rework the same on the basis of assessed*

income finally determined". The AR submitted that even the direction given by the CIT(A) is on an entirely wrong interpretation of the relevant provision.

34. We have considered the issue and we are in agreement with the arguments of the AR that interest though mandatory, can be charged if only there is a shortfall on the installments of payment of advance tax calculated on the basis of tax due on returned income and does not involve the tax due on assessed income. We, therefore, set aside the direction of the CIT(A) and modify the same by directing the AO to charge interest *under section* 234C if at all, on any shortfall in the installments in each of the quarter calculated on the basis of tax due on returned income in accordance with law. The ground is, therefore, allowed for statistical purpose.

35. In the result, the appeal filed by the assessee is partly allowed.

ITA no. 7851/Mum/2011

36. The only issue involved is holding the compensation received on amenities provided as income from other sources instead of income from house property, as claimed by the assessee. The facts and the conclusion, as found recorded in the order are:

> "*(a) The appellant* is *owner of property at Mahindra Towers (2nd and 3rd Floor). The appellant entered into agreement with Raymond Limited to lease the premises at* a *monthly lease rent of* ₹ *41,06,080/- together with* a *monthly compensation of* ₹*10,26,520/- for use of amenities and facilities. Copies of the agreements are enclosed along with this appeal and marked collectively* as ***Annexure*** *"A". During the previous year relevant to assessment year under appeal, the appellant received* a *sum of* ₹ 6,15,91,200/- as *income from letting out of the aforesaid property. The appellant offered the same for tax under the head "Income from house property". However, the Assessing Officer treated the compensation*

received by the appellant amounting to ₹1,23,18,240/- *for use of amenities* as *services charges received in respect of services rendered in providing electricity, use of lifts, supply of water maintenance of stair case, etc and assessed the same under the head "Income from other sources". The* Assessing *Officer relied on the decision in the* case *of CIT V. Model Mfg. Co. Pvt. Ltd.* (1989) 175 *ITR* 374 *(Cal.). Accordingly, the* Assessing *Officer reduced the deduction under section* 24 *of the Act by* a *sum of* ₹ *36,95,472/-.*

The appellant submits that it *has not rendered any services of the aforesaid nature* to *Raymond Limited. The appellant has entered into agreement with Raymond Limited for receiving compensation of use of various amenities and facilities provided by the builder. The building* is *constructed by Mahindra & Mahindra Ltd. The appellant submits that the building* is a *multi* storied *commercial premises having lift, central air-conditioning, supply of water* & *electricity, garden, security, drainage etc. facilities. The aforesaid facilities are provided by the builder i.e. Mahindra and Mahindra Limited and not by the appellant. The aforesaid* services *are provided* to *all the tenants of the building by the builder. The appellant, therefore, submits that these services are* a *part and parcel of the let out of the premises.*

The appellant submits that the decision relied on by the Assessing *Officer* is *not applicable* to *the* case *of the appellant. In the* said case *the lessor of the building was rendering various* services *such* as *use of lifts, supply of water etc. It* is *in this context the court has held that income from rendering of such* services *should be treated* as *"Income from other sources". However in the* case *of the appellant, the services are provided by the builder of the premises and the appellant* is *only receiving compensation from Raymond Limited for use of those amenities and facilities provided by the builder. The appellant further submits that Raymond Limited has deducted tax* at *source on the entire amount including the compensation paid to the appellant under section* 1941 *of the Act (relating to payments in the nature of rent.) The appellant reiterates that the above facilities are part and parcel of the premises let out by the appellant and no separate* services *are rendered by the appellant and the* Assessing *Officer ought to have treated the* same as *income from house property.*

The appellant submits that the Bombay High Court in the case *of Bhaktauiar Constructions Pvt Ltd* (1986) 162 *ITR* 452 *(Bom) has held that where the building was let out* to *tenants under lease agreements and the tenants were provided with air- conditioning facilities, there was*

no letting of installation of air-conditioning plant. Therefore, there was no letting of installation of air-conditioning plant. Therefore, there was no inseparable letting of the machinery so as to *bring the* case *under section 56(2)(iii). The Court held that the income was taxable under the head "Income from house property". Similar* is *the* case *of the appellant where there* is *not separate letting of the amenities and facilities by the appellant. In fact the facilities are provided by the builder themselves which are* a *part of the premises let out. Accordingly, the compensation received from the use such facilities partakes the character of income from letting out of property and therefore taxable* as *income under the head income from house property*.

The appellant submits that on the similar facts the learned CIT(A) has allowed appellant's appeal for AY 2000-01,2001-02, 2002-03, 2004-05, 2005-06, 2006-07 *and* 2007-08. *Copies of the* same *are enclosed along with this appeal and marked* as *Annexure "B" to "B6". The Income-tax Appellate Tribunal in A.* Y. *2000-01, A.* Y. 2001-02, *A.* Y. 2002-03 *and A.* Y. 2004-05 *in appellant's case vide its order dated 5th January,* 2007, *10th December,* 2007, *12th December,* 2008, *9th September 2010 respectively, has upheld the said order of the CIT(A). Copies of the same are enclosed along with this appeal and marked as Annexure* "C" to *"C3". Accordingly, the Assessing Officer be directed* to *assess the compensation received as "Income from house property" and accordingly grant additional deduction under section* 24 *of the Act* to *the extent of Rs.* 36,95,472/-".

37. The DR relied on order of AO where as AR reiterated the submissions made before the revenue authorities and relied on the decision of the CIT(A).

38. After going through the entire facts, we find that the issue stands covered in the assessee's own cases by the coordinate Bench decisions, in ITA no. 6967 & 6623/Mum/2003 and ITA no. 822/Mum/2007 and ITA no. 9545/Mum/2004.

39. Respectfully following the decisions of the assessee's own cases as mentioned above and placing reliance on the decision of Bhaktawar Constructions Pvt. Ltd., reported in 162 ITR 452 (Bom), We uphold the observations of the CIT(A) and reject the appeal filed

by the department. We, therefore, dismiss the appeal filed by the department.

40. To sum up: Assessee's appeal in ITA No. 7858/Mum/2011 is partly allowed while the Revenue appeal in ITA No. 7851/M/2011 is dismissed.

Order pronounced in the open court on 13th March, 2013

Sd/-	Sd/-
(Vivek Varma)	**(B. Ramakotaiah)**
Judicial Member	**Accountant Member**

Mumbai, dated 13th March, 2013.

Vnodan/sps

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The concerned CIT(A)*
4. *The concerned CIT*
5. *The DR, " J " Bench, ITAT, Mumbai*

By Order

Assistant Registrar
Income Tax Appellate Tribunal,
Mumbai Benches, MUMBAI