INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "E": NEW DELHI
BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
(Through Video Conferencing)

ITA No. 3391/Del/2016
(Assessment Year: 2011-12)

DLF Universal Ltd, 3rd Floor, Shopping Mall, Arjun Marg, DLF City, Phase-1, Gurgaon PAN: AAACJ1655P	Vs.	DCIT, Circle-1(1), Gurgaon
(Appellant)		(Respondent)

ITA No. 3342/Del/2016
(Assessment Year: 2011-12)

ACIT, Circle-1(1), Gurgaon	Vs.	DLF Universal Ltd, 3rd Floor, Shopping Mall, Arjun Marg, DLF City, Phase-1, Gurgaon PAN: AAACJ1655P
(Appellant)		(Respondent)

Assessee by :	Shri R. S. Singhvi, CA Shri Satyajeet Goel, CA
Revenue by:	Ms. Aman Preet, Sr. DR
Date of Hearing	22/03/2021
Date of pronouncement	24/05/2021

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. These are the cross appeals filed by the assessee DLF Universal Ltd (The appellant/ assessee) and The Assistant Commissioner Of Income Tax , Circle-1(1), Gurgaon (The ld AO) against the order passed by the ld Commissioner of Income tax (A)-1, Gurgaon[The ld CIT (A)] dated 31.03.2016 for the Assessment Year 2011-12.

2. The assessee in its appeal in ITA No. 3391/Del/2016 has raised the following grounds of appeal:-

"1. That on the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) erred in re-computing and

restricting the disallowance u/s 14A at Rs. 15,42,000 which is 0.5% of investment of Rs. 30.84 Cr, without giving any cogent reasons or pointing any inaccuracy in the amount already disallowed by the appellant of Rs. 6,23,210/- in the return of Income..

2. *That learned Commissioner of Income-tax (Appeals) failed to bring anything on record to show as to how expenditure of Rs 6,23,210/- already disallowed by the appellant company is not sufficient to earn the tax free income of Rs. 22,34,355/-.*

3. *That learned Commissioner of Income-tax (Appeals) failed to bring to record anything to show the proximity of expenditure calculated under Section 14A with the dividend income earned, apart from the expenditure already disallowed by the appellant.*

4. *That the impugned order dated 31.03.2016 passed by the learned Commissioner of Income-tax (Appeals), Gurgaon is bad in law and wrong on facts to the extent as stated above."*

3. The revenue in its appeal in ITA No. 3432/Del/2016 has raised the following grounds of appeal:-

"1. Ld. CIT(A) has erred on fact and in law in deleting the addition u/s 40A(2)(b) of the Act of Rs.8308348/- made by the Assessing Officer on account of payment made to related party M/s DLF Home Developers Ltd.

2. *Ld.CIT(A) has erred on fact and in law in deleting the addition of 2,38,26,486/- made by the Assessing Officer on account of payment claimed to be made to Associated Infrastructure Company(AIC) for construction of compound wall, leveling of land, construction of labour quarter etc. when the assessee had not furnished any documentary evidence of development work actually done on the land during assessment proceedings.*

3. *Ld. CIT(A) has erred on fact and in law in deleting the addition of Rs. 1.72.72,980/- made by the Assessing Officer on account of brokerage paid to M/s Totem Infrastructure Pvt. Ltd., on sale of land at Vadora as the asessee had failed to produce any agreement with M/s Totem Infrastructure Ltd for any such arrangement during assessment proceedings.*

4. *Ld. CIT(A) has erred on fact and in law in restricting the disallowance from Rs.6,03,51,403/- to Rs.15.42.000/ made by the Assessing Officer under Section 14A of the Income Tax Act, 1961, since the Assessing Officer has made the addition on proper application of Section 14A of the Income Tax Act, 1961.*

5. *Ld.CIT(A) has erred on fact and in law in ignoring CBDT Circular No.5 of 2014 dated 11.02.2014 .clarifying that disallowance under Rule 8D read with Section 14A of the Income Tax Act is to be made even where taxpayer in a particular year ^has not earned any exempt income."*

4. Brief facts of the case shows that the assessee is a company carrying on the business of real estate development. For Assessment Year 2011-12 the

assessee filed its return of income on 31.09.2011 declaring total loss of Rs. 1,63,24,28,377/-. The return of income was revised on 31.03.2012 at income of Rs. 41,49,07,760/-. On selection of scrutiny the ld AO assessed the income u/s 143(3) of the Act per order dated 31.03.2014 at Rs. 52,46,66,977/-. The ld AO made the following additions/ disallowances:-

a. Disallowances u/s 14A of the Rs. 60351403/-.
b. Disallowance of brokerage paid on sale of land at Rs. 1,72,72,980/-
c. Disallowance on cost on improvement of Rs. 2,38,26,486/-.
d. Disallowance of payment u/s 40A2(b) of Rs. 83,08,348/-.

5. Thus, the total disallowance of Rs. 10,97,59,217/- was made to the total income of the assessee.

6. The assessee preferred an appeal before the ld CIT(A), who upheld the disallowance u/s 14A of Rs. 15,42,000/- being 0.5% of investment. He deleted the other portion of disallowances on account of interest u/s 14A. all other disallowances were also deleted by him. The ld AO is contesting the other disallowances whereas the assessee is contesting the retention of the disallowances to the extent of 0.5% u/s 14A of the Act. Thus, these two appeals are filed.

7. We have heard the parties on these appeals, perused the orders of lower authorities, and also gone through a paper book filed on behalf of assessee.

8. First, we take up the appeal of the ld AO.

9. First ground of appeal is against the deletion of the disallowances u/s 40A(2)(b) of the Act of Rs. 83,08,348/- made on account of payment commission made to related party M/s. DLF Home Developers Ltd for service charges on account of collection received from customers on account of project Capital Green Phase 1. The assessee has deducted tax at source on the same. The DLF Home Developers is a subsidiary company of the assessee company and therefore, claim of the assessee is that provision of section 40A(2)(b) do not apply to such payment. The said payment being made by the developers assessee for arranging and organizing the collection from customers on behalf of the assessee as marketing right of the project lies with DLF Home Developers only. The ld AO held that the assessee has not incurred these expenses to meet legitimate needs of the business. Therefore, he applied the provisions of section 40A(2)(a) and held that the

expenditure made by the assessee are excessive in nature. The ld CIT(A) deleted the above disallowances.

10. Fact shows that the assessee has made payment to the parties for three bills. Two bills have been made dated 30.09.2010 amounting to Rs. 1.40 crores and Rs. 39.18 lakhs. The third bills was paid as per bill dated 31.03.2011 of Rs. 83,08,348/-. The ld AO has disallowed amount involved in last bill but has allowed the earlier two bills despite the payments made for same services. There is no reasoning given by the ld AO that why the earlier two payment to the same party for the same services for the same accounting period on same terms and conditions are allowable, whereas the last bill itself was found to be not justified. Even at the time of disallowances, the ld AO could not show any comparable cases that the payment made to the recipient of income is unreasonable or excessive. In fact, the ld CIT(A) has noted that the assessee has paid commission to this party @ 1% whereas commission to other brokers is paid @2%. Therefore it is apparent that conditions satisfied u/s 40A(2) of classifying expenditure as excessive or unreasonable is not satisfied as the comparable market rate for same services provided by unrelated parties are higher. In view of this, we do not find any infirmity in the order of the ld CIT(A) in deleting the above disallowance. Accordingly, ground No. 1 of the appeal against the deletion of the disallowance u/s 40A(2)(b) of Rs. 83,08,348/- for payment made to the related party M/s. DLF Home Developers Ltd is confirmed. Thus, Gr. No. 1 is dismissed.

11. Ground No. 2 is regarding the disallowance of Rs. 2,38,26,486/- on account of cost of improvement while calculating the capital gain earned by the assessee. The fact shows that another company M/s. DLF Comfort Hotels Pvt Ltd got merged into assessee company during the year and has shown a short term capital loss of Rs. 5,47,66,443/-. The ld AO noted that the above loss is on account of sale of piece of land. The assessee has shown the cost of improvement of Rs. 2,38,26,486/- as cost of improvement and has claimed deduction for working capital gain. The assessee submitted that this payment is paid to Associated Infrastructure Company for construction of a compound wall, leveling of land etc. The ld AO disallowed the same as the assessee did not furnish any documentary evidence and such working

was also not evident from the sale deed. The contention of the assessee was that above expenditure are reflected in the books of account consistently over the years and has been accepted by the revenue. The ld CIT(A) deleted the above addition.

12. It is apparent that the assessee company has sold land at Jamnagar at Rs. 7,91,35,786/- and incurred a loss of Rs. 5,47,66,443/-. The assessee has incurred the total cost of Rs. 2,38,26,486/- for which major portion is cost for development as per agreement dated 29.04.2008 at Rs. 2,26,10,196/-. Small petty expenses of leveling etc were also incurred. The cost of development was paid to Associated Infrastructure Company for cost of development of the land at the rate of Rs. 200 per sq ft as per tripartite arrangement dated 29.04.2008. The ld CIT(A) considered the agreement and referred to the clauses of agreement at para 5.3. It was noted that the above amount of cost of development was integral part of the development and therefore, it cannot be ignored and disallowed. The purchase agreement itself contains the provisions for development of land at the behest of the Vendor. It was also carried in the books of accounts of earlier years. Therefore, there is no justification for the ld AO to disallow the same. Accordingly, we confirm the order of the ld CIT(A) in deleting the addition of Rs. 2,38,26,486/- as cost on improvement for the land sold. Accordingly, the ground No. 2 of the appeal of the ld AO is dismissed.

13. The ground No. 3 is against the deletion of addition of Rs. 1,72,72,980/- on account of brokerage paid to M/s. Totem Infrastructure Ltd on sale of land at Vadodara. The assessee has paid a brokerage of the above sum on sale of land at Vadodora. The assessee incurred the capital loss. The ld AO disallowed the same as the assessee could only submit the copy of the bill for brokerage but according to ld AO assessee failed to submit justification for payment of brokerage to the above party. The ld AO was of the view that the brokerage has resulted into capital loss on the sale of land, the assessee has not paid brokerage on sale of other asset, and assessee could not establish that same is paid wholly and exclusively for sale of Vadodara land. On appeal before the ld CIT(A), he noted that assessee has paid brokerage to other brokers also for sale of land and he noted such existence. With respect to the brokerage he referred to the invoices and also noted that Totem

infrastructure Ltd were appointed as broker for rendering assistance and services for the sale of land. The information along with PAN of the broker was provided to the ld AO. The ld AO disbelieved it without any evidence that the expenses are not wholly and exclusively for the transfer of the land. The ld CIT(A) deleted the addition.

14. We find that the above brokerage was paid by the assessee to M/s. Totem Infrastructure Ltd for sale of property at Vadodara. The assessee has also paid similar brokerage for sale of land at Jamnagar. Therefore, the claim of the ld AO that the assessee paid brokerage only for sale of Vadodara property is not correct. However, during the course of assessment wherein details of payment of brokerage at 1.80% on sale of Rs. 87 crores at Vadodara land along with address and PAN of the broker was given. The ld AO did not make any enquiry on the bill but merely on other reasons made the disallowance. The ld CIT(A) has categorically dealt with all these reasons and deleted the addition. Even before us, the findings of the ld cit (A) were not controverted. We find that the brokerage paid by the assessee is demonstrated in the bill , which is for the purpose of the sale of Vadodara Land. Therefore, in absence of any specific enquiry proving otherwise, the above disallowance cannot be made. Even otherwise, other findings of the ld AO about payment of brokerage on other properties sold were not found correct. Thus, we do not find any infirmity in the order of the ld CIT(A) in deleting the above disallowances. Accordingly, ground No. 3 of the appeal of the ld AO is dismissed.

15. Ground No. 4 and 5 of the appeal of the ld AO and ground No. 1 to 3 of the appeal of the assessee are on the issue of disallowance made u/s 14A of the Act. The facts shows that the assessee has made investment in shares to the tune of Rs. 53.51 crores and during the year assessee has received the dividend of Rs. 22,34,355/-, which is exempt income u/ 10 (34) of the act. The ld AO noted that the assessee has made interest payment and has also incurred certain expenditure. Therfore according to him, the assessee has incurred proportionate expenditure for earning exempt income. Therefore, disallowances u/s 14A of the Act is required to be made. During the assessment proceedings, the assessee offered voluntarily disallowances made under Rule 8D of Rs. 6,23,210/- being 50% of salary of Rs.

12,46,542/- on one of the employee for disallowances. However, assessee did not make any disallowance in the return of income u/s 14A of the act. As assessee has offered disallowances during assessment proceedings, The ld AO recording his satisfaction held that the assessee has incurred expenditure for earning exempt income. With respect to the interest expenditure the assessee submitted that its share capital and reserve is Rs. 983 crores whereas the investment in shares is only Rs. 53 crores, therefore, there cannot be any disallowance on account of interest expenditure. The assessee also stated that exempt income is only Rs. 22,34,355/- therefore, disallowance cannot exceed the above sum. With respect to other expenditure-covered u/r 8D(2)(iii) assessee submitted that it has not incurred any expenditure. However, ld AO noted that assessee itself has offered salary expenditure for disallowance u/r 8D (2) (iii) , therefore, ld AO applied the provision of Rule 8D and disallowed interest expenditure directly attributable of Rs. 4,40,41,001/-, indirect interest expenditure of Rs. 1,36,35,010/- and other administrative expenditure @0.5% on average value of investment of Rs. 36,75,392/-. The total disallowances of Rs. 6,03,51,403/- was made. The ld CIT(A) deleted the disallowances on account of interest expenditure of Rs. 4,40,41,001/- and indirect interest expenditure allocated of Rs. 1,36,35,010/- for the reason that share capital and free reserve available with assessee is much higher than the amount of investment in equity shares yielding exempt dividend income. With respect to other expenditure, he excluded Rs. 22.67 crores from the total investments made in the subsidiary company out of investment of Rs. 53.51 crores relying on the decision of ITAT and thus he applied 0.5% on investment of Rs. 30.84 crores and restricted the disallowances of Rs. 1542,000/- instead of Rs. 3675953/-. Thus, the disallowance u/s 14A was retained only to the extent of 0.5% of average value of investment other than investment in subsidiaries companies.

16. It is apparent that the assessee has earned exempt income being dividend from the investment in equity shares. It did not disallow any sum in the return of income, however, when assessee was confronted during the course of assessment proceedings, it surrendered a sum of Rs. 6,23,210/- being 50% of the salary of one employee as expenditure incurred for earning

exempt income. This fact itself proves that assessee has incurred certain expenditure for the purpose of earning exempt income. However, the assessee did not given any basis for allocating 50% of the salary of one person. No other corresponding expenditure or incidental expenditure was disallowed. The ld AO noted this fact and recorded his satisfaction that the claim of the assessee is that it has not incurred any expenditure in earning the exempt income is incorrect. Thus no fault can be found with the action of the ld AO in applying provision of Rule 8 D as it satisfied the condition laid down u/s 14A (2) of the act. As far as the issue of interest expenditure is concerned, it is apparent that assessee has huge interest free funds in form of share capital and free reserve of approximately Rs. 983 crores against the investment in equity shares of Rs. 53 crores. Therefore, in absence of any contrary evidence, the presumption lies in favour of the assessee that investment in such equity shares have been made out of interest free funds. The ld CIT(A) has deleted the same on this basis only. The judicial precedents also now support this claim of the assessee. Hon. Delhi High court in CIT V Taikisha Eng Co Ltd [2015] 54 taxmann.com 109 (Delhi)/[2015] 229 Taxman 143 (Delhi)/[2015] 370 ITR 338 (Delhi)/[2015] 275 CTR 316 (Delhi) has held that :-

> **18.** It is in this context we feel that the findings recorded by the CIT(A) and the Tribunal are appropriate and relevant. The clear findings are that the assessee had sufficient funds for making investments in shares and mutual funds. The said findings coupled with the failure of the Assessing Officer to hold and record his satisfaction clinches the issue in favour of the respondent assessee and against the Revenue. The self or voluntary deductions made by the assessee were not rejected and held to be unsatisfactory, on examination of accounts. Judgments in *Tin Box Co.* (*supra*), *Reliance Utilities and Power Ltd.* (*supra*), *Suzlon Energy Ltd.* (*supra*) and *East India Pharmaceutical Works Ltd.* (*supra*) would be relevant if the satisfaction of the Assessing Officer is in issue, and such question of satisfaction is with reference to the accounts."

17. In view of this we do not find any infirmity in the order of the ld CIT(A) in so far as the deleting the disallowance on account of interest. It is also not the

claim of the ld AO that the assessee has utilized interest-bearing funds for making investment in the equity shares.

18. So far as the issue of other expenditure is concerned where the ld AO has applied 0.5% of investment of Rs. 53.51 crores whereas the ld CIT(A) restricting 0.5% only Rs. 30.84 holding that balance investment of approximately Rs. 22 crores was made in the subsidiary companies and there was no intention of earning any dividend income. The ld CIT(A) while holding so relied upon the decision of the Chennai Bench in case of EIH Associated Hotels Vs. Dy. CIT ITA No. 1503/Mds/2012 dated 27.05.2013 and also of Delhi bench in Pioneer Radio Trading Services Vs. Department of Income Tax in ITA No. 4448/Del/2013 dated 19.01.2015. The main logic behind this is that investments are made for strategic purposes. We find that this controversy has come to an end by the decision of the Hon'ble Supreme Court in case of Maxxop Investment Ltd Vs. CIT Civil Appeal No. 104/2016[2018] 91 taxmann.com 154 (SC)/[2018] 254 Taxman 325 (SC)/[2018] 402 ITR 640 (SC)/[2018] 301 CTR 489 (SC) wherein, it has been held that dominant purpose for which investment into shares are made is not relevant for disallowance u/s 14A of the Act. The Honourable supreme court held that :-

> **"34.** Having clarified the aforesaid position, the first and foremost issue that falls for consideration is as to whether the dominant purpose test, which is pressed into service by the assessees would apply while interpreting Section 14A of the Act or we have to go by the theory of apportionment. We are of the opinion that the dominant purpose for which the investment into shares is made by an assessee may not be relevant. No doubt, the assessee like Maxopp Investment Limited may have made the investment in order to gain control of the investee company. However, that does not appear to be a relevant factor in determining the issue at hand. Fact remains that such dividend income is non-taxable. In this scenario, if expenditure is incurred on earning the dividend income, that much of the expenditure which is attributable to the dividend income has to be disallowed and cannot be treated as business expenditure. Keeping this objective behind Section14A of the Act in mind, the said provision has to be interpreted,

particularly, the word 'in relation to the income' that does not form part of total income. Considered in this hue, the principle of apportionment of expenses comes into play as that is the principle which is engrained in Section 14A of the Act. This is so held in *Walfort Share & Stock Brokers (P.) Ltd.*, relevant passage whereof is already reproduced above, for the sake of continuity of discussion, we would like to quote the following few lines therefrom."

19. Therefore, we find that the decision relied upon by the ld CIT(A) wherein, could not be applied . In view of this we hold that there is no justification for reducing the sum of Rs. 22.67 crores being investment in subsidiaries out of total investment in equity shares of Rs. 53.51 Therefore, we find that disallowances of Rs. 26,75,393/- should have been confirmed by the ld CIT(A). Anyway as the disallowance u/s 14A cannot exceed the exempt income of Rs. 22,34,355/- ,we direct the ld AO to restrict the disallowance only to the extent of Rs. 22,34,355/-. Accordingly, appeal of the assessee is dismissed and appeal of the ld AO with respect to ground No. 4 and 5 is partly allowed.

20. In the result appeal of the assessee is dismissed and appeal of the ld AO is partly allowed.

Order pronounced in the open court on 24/05/2021.

-Sd/-	-Sd/-
(KUL BHARAT)	(PRASHANT MAHARISHI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 24/05/2021
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi