

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'C', NEW DELHI**

**Before Sh. Amit Shukla, Judicial Member**

**Dr. B. R. R. Kumar, Accountant Member**

**ITA No. 6602/Del/2016 : Asstt. Year : 2012-13**

|  |    |  |
|--|----|--|
| Asstt. Commissioner of<br>Income Tax, Circle-12(1),<br>New Delhi | Vs | M/s Indiabulls Real Estate Ltd.,<br>M-62 & 63, First Floor, Connaught<br>Place, New Delhi-110001 |
| <b>(APPELLANT)</b>   |    | <b>(RESPONDENT)</b>  |
| <b>PAN No. AABCI5194F</b>  |    |  |

**ITA No. 6603/Del/2016 : Asstt. Year : 2012-13**

|  |    |   |
|--|----|---|
| Asstt. Commissioner of<br>Income Tax, Circle-12(1),<br>New Delhi | Vs | M/s Indiabulls Financial Services Ltd.,<br>M-62 & 63, First Floor, Connaught<br>Place, New Delhi-110001 |
| <b>(APPELLANT)</b>   |    | <b>(RESPONDENT)</b>   |
| <b>PAN No. AAACI8570Q</b>  |    |   |

**Assessee by : Sh. Gautam Jain, Adv. &  
Sh. Lalit Mohan, CA**

**Revenue by : Sh. Rajesh Kumar Kedia, CIT DR**

**Date of Hearing: 10.02.2020**

**Date of Pronouncement: 11.03.2020**

**ORDER**

**Per Dr. B. R. R. Kumar, Accountant Member:**

The present appeals have been filed by the revenue against the orders of the Id. CIT(A)-4, New Delhi dated 18.10.2016 & 20.10.2016.

2. Since, the issues involved in both the appeals are common, they were heard together and are being disposed off by common order.

3. In ITA No. 6602/Del/2016, following grounds have been raised by the revenue:

*"1. On the facts and circumstances of the case, the Id. CIT (A) has erred in deleting the disallowance u/s 14A r.w. Rule 8D of the Act, amounting to Rs.16,37,03,673/-.*

*2. On the facts and circumstances of the case, the Id. CIT (A) has erred in deleting the disallowance of excess depreciation, amounting to Rs.24,30,299/-.*

*3. On the facts and circumstances of the case, the Id. CIT (A) has erred in deleting the disallowance of additional claim of deduction on account of Employee Compensation Expenses, amounting to Rs.66.33 crores."*

### **ITA No. 6602/Del/2016**

#### **Disallowance u/s 14A:**

4. The relevant facts required for the adjudication of this issue are:

Investments of the assessee: Rs.656,58,000,000/-

Exempt income earned: Rs.1,93,80,332/-

Disallowance made by the assessee: Rs.4,16,933/-

Disallowance made by the revenue: Rs.16,41,20,606/-

5. Thus, *prima facie* we find that the disallowance made by the revenue is much more than the exempt income earned by the assessee. From the assessment order, we find that the Assessing Officer resorted to re-computation of the disallowance on the grounds that no rationale was furnished by the assessee in deciding the amount disallowed. Further, no separate staff or

work station has been maintained by the assessee towards investment activities. The Assessing Officer further held that the earning of income is not in the nature of passive activity but in fact, it is a well coordinated management decision regarding the deployment of funds. The Assessing Officer relied on the judgment of the ITAT Special Bench New Delhi in the case of Cheminvest Ltd. in ITA No. 87/Del/2008.

6. Before us, during the arguments, the Id. DR relied on the assessment order and the Id. AR supported the order of the Id. CIT (A).

7. The relevant portion of the Assessing Officer is as under:  
*"Para 2: The assessee company is engaged in the business of projects, engineering, industrial and technical consultancy, construction and development of real estate properties and other related and ancillary activities. The books of accounts were produced which have been examined on text check basis.*

*"para 4.....During the assessment proceedings, the AR of the assessee was asked to explain as to why the disallowance u/s 14A should not be made in accordance with Rule 8D. In response, the assessee filed its reply vide letter dated 15.01.2015 wherein it stated that "the assessee has already made disallowance u/s14A amounting to Rs.4,16,933/- being the expenses attributable to exempt income". However, nothing has been furnished by the assessee in this regard. Hence, the claim of the assessee in this regard is not found to be acceptable and the issue is decided on the basis of information available on record.*

*There is no rationale furnished by the assessee in deciding the amount disallowed at Rs.4,16,933/-. Further, no separate staff or*

*work station has been deployed / maintained by the assessee towards the investment activities. Further, the earning of exempt income is not the nature of passive activity having no input. In fact in present situation making of Investment, maintaining or continuing of investment and time to exit from investment are well informed and well coordinated management decision involving not only inputs from various source but also acumen of senior management functionaries. Therefore cost is inbuilt into even so called "passive" investment. There are incidental expenditures of collection, telephone, follow up etc. Therefore expenses in relation to earning of income are embedded in indirect expenses.*

*Section 14A of the I T Act, 1961 regulates the expenditure which was incurred in relation to exempt income. By virtue of this section no deduction is allowable in respect of expenditure incurred by the assessee on account of income which does not form part of the total income under the Act. The CBDT has notified rule 8D to avoid ad-hoc disallowance to impart visibility to the expenditure incurred for earning exempt income. Moreover, procedure for computation of disallowance has been provided in sub-sections (2) and (3) of section 14A of the I T Act. The Hon'ble ITAT, Special Bench, New Delhi in the case of M/s Cheminvest Ltd. ITA no 87/Del/2008 has also held that the disallowance u/s 14A is to be made even if no exempt income has resulted or earned by the assessee in the year under consideration Therefore in view of the specific provisions for quantification of disallowance as contained in sub-sections (2) and (3) of section 14A, which are procedural, the disallowance is strictly to be made in terms of the specific provisions of Rule 8D.*

*Attention is also invited to the language of Rule 8D(2)(ii) wherein it has been clearly mentioned that the average value of assets shall be computed in respect of investment, income from which does not or*

*shall not form part of the total income, as appearing in the balance sheet of the assessee, on the first day and the last day of the previous year.*

*Rule 8D(1) of Income Tax Rules, 1962 prescribed the applicability of the procedure. In case, the Assessing Officer is not satisfied with the correctness of the claim of the expenditure made by the assessee, the procedural provisions of Rule 8D are very much applicable to compute the expenditure which are incurred in relation to such income which does not form part of the total income."*

8. The Id. DR argued relying on the following case judicial pronouncement and submitted the arguments in writing.

1. Maxopp Investment Ltd. Vs CIT [2018] 91 taxmann.com 154 (SiC)/[2018] 254 Taxman 325 (SC)/[2018] 402 ITR 640 (SC)/[2018] 301 CTR 489 (SC) where Hon'ble Supreme Court held that

(1) When the shares are held by the assessee not to earn exempt income but to retain controlling stake in the investee company, the dominant purpose test cannot be said to be relevant for the purpose of Sec 14A and disallowance u/s 14A can be made. It is not the dominant purpose test but the principle of apportionment which is ingrained in the provisions of Section 14A. When the assessee itself makes disallowance of certain expenditure incurred to earn dividend income and if the AO does not accept such disallowance, it is necessary for the AO to record satisfaction before rejecting the same.

(2) Section 14A would be applicable only to income arising from the investment portfolio and not from stock-in-trade.

2. Indiabulls Financial Services Ltd. Vs DCIT [2016] 76 taxmann.com 268 (Delhi)/[2017] 395 ITR 242 (Delhi) where Hon'ble Delhi High Court held that where Assessing Officer after carrying out elaborate analysis and following steps enacted in statute, had determined amount of expenditure incurred for earning tax exempt income, merely because he did not expressly record his dissatisfaction about assessee's calculation, his conclusion could not be rejected.

3. Jubilant Securities Pvt. Ltd. Vs DCIT T20181 90 taxmann.com 126 (Delhi)/[2018] 253 Taxman 284 (Delhi)/[2018] 400 ITR 527 (Delhi), 2018-TIQL- 75-HC-DEL-IT where Hon'ble Delhi High Court held that when the CIT(A) reduced the quantum of disallowance made u/s 14A and the assessee did not file appeal against the same, raking up the same issue after four years when there is a favourable judicial decision on record, is akin to raising a dispute against a stale issue.

4. Lally Motors India (P.) Ltd. Vs PCIT (T20181 93 taxmann.com 39 (Amritsar - Trib.)/[2018] 170 ITD 370 (Amritsar - Trib.) where Hon'ble ITAT Amritsar held that Section 14A would apply even if no dividend was earned by assessee from investments in shares.

5. Godrej & Boyce Manufacturing Company Ltd. Vs DCIT [2017] 81 taxmann.com 111 (SC)/[2017] 247Taxman361 (SC)/[2017] 394 ITR 449 (SC)/[2017] 295 CTR 121 (SC) where Hon'ble Supreme Court held that where Assessing Officer after carrying out elaborate analysis and following steps enacted in statute, had determined amount of expenditure incurred for earning tax

exempt income, merely because he did not expressly record his dissatisfaction about assessee's calculation, his conclusion could not be rejected.

6. Punjab Tractors Ltd Vs CIT [2017] 78 taxmann.com 65 (Punjab & Haryana)/[2017] 246 Taxman 31 (Punjab & Haryana)/[2017] 393 ITR 223 (Punjab & Harvana)/[2017] 293 CTR 50 (Punjab & Haryana), 2017-TIQL-353- HC-P&H-IT where Hon'ble Punjab & Haryana High Court held that AO is bound to apply provisions of Rule 8D where he is not satisfied with the correctness of the claim of assessee in respect of expenditures incurred to earn exempt income.

7. Avon Cycles Ltd Vs CIT [2015] 53 taxmann.com 297 (Punjab & Haryana)/[2015] 228 Taxman 368 (Punjab & Haryana HMAG.) where Hon'ble Punjab & Haryana High Court held that where funds utilized by assessee was mixed funds and, hence, interest paid on borrowed fund was also relatable to interest on investment made in tax free funds, interest expenditure relatable to investment in tax free funds was to be computed under provisions of Rule 8D(2)(ii).

8. Nahar Spinning Mills Ltd. Vs CIT [2017] 82 taxmann.com 154 (Punjab & Haryana)/[2017] 395 ITR 12 (Punjab & Haryana) where Hon'ble Punjab & Haryana High Court held that disallowance of proportionate administrative expenditure made for earning exempted dividend income computed on reasonable basis would be just (A.Y.2006-07).

9. Dy. CIT v. Viraj Profiles Ltd. f20151 64 taxmann.com 52 (Mumbai - Trib.)/[2016] 46 ITR(T) 626 (Mumbai - Trib.)/[2016]

156 ITD 72 (Mumbai - Trib.)/[2016] 177 TTJ 466 (Mumbai - Trib.) where Hon'ble ITAT Mumbai held that disallowance of expenditure - Addition on account of disallowance under S. 14A read with Rule 8D being expenditure in relation to earning of exempt income to book profit under S. 115JB justified. [S.115JB]

10. Vipin Malik vs ACIT [2017] 88 taxmann.com 415(Delhi - Trib) /[2016] 45 ITR(T) 589(Delhi- trib)

Where Hon'ble ITAT Delhi held that disallowance of expenditure -Event income - No disallowance was made by the assessee invoking the provision read with rule8D(2)(iii) was held to be justified[R.8D] (AY 2009-10)

9. The Id. AR relied on the order of the Id. CIT (A).

10. Having gone through the facts on record and applicability of the case laws quoted by the Id. DR to the case before us, we find that the cases referred are mostly where the revenue has gone through the books of accounts, not satisfied with the disallowance made by the Assessing Officer and the reasons of such non-satisfaction has been mentioned in detail in the orders, whereas in the instant case, the books of account have been produced before the Assessing Officer which have been examined on test check basis. (refer Assessing Officer above) While re-computing the disallowance, the Assessing Officer has not followed the provisions of Section 14A(2) of the Income Tax Act, 1961 wherein it is mandated that, 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 which does not form part of the total income under the Act, then the Assessing Officer shall determine the amount of expenditure incurred in relation to such income. Further, the Act also mandates that such re-computation also applies in relation to a case where the assessee claims that no expenditure has been incurred by him in relation to the income which does not form part of the total income. From the reading of the judgment of the Hon'ble Apex Court in the case of Maxopp Investment Ltd. Vs CIT in CA Nos. 104-109 OF 2015, we find that having regard to the language of Section 14A(2) of the Act, read with Rule 8D of the Rules, it clear that before applying the theory of apportionment, the AO needs to record satisfaction that having regard to the accounts of the assessee suo moto disallowance under Section 14A was not correct. It will be in those cases where the assessee in his return has himself apportioned but the AO was not accepting the said apportionment, in that eventuality, the Assessing Officer will have to record its satisfaction to this effect.

11. In the instant case, we find that no such satisfaction has been recorded by the A.O to come to the conclusion to invoke the provisions of Section 14A(2). Hence, we decline to interfere with the order of the Id. CIT (A) and the disallowance is directed to be deleted.

12. The similar ratio applies to ground no. 1 in ITA No. 6603/Del/2016.

**Depreciation:**

13. The Assessing Officer allowed the claim of depreciation on software @25% against the 60% depreciation claimed by the assessee. The Id. CIT (A) deleted the addition on the grounds that the Assessing Officer has misled himself treating the software as intangible asset.

14. Having gone through the record, we find that the nature of the software acquired were licenses, which do not confer any enduring right and could be used for the duration as acquired for by the licensor. The taxpayer's objective was to use computer software to maximize its performance and streamline efficiency. The Hon'ble Bombay High Court in the case of M/s I-Flex Solutions Ltd. reported in 225 Taxmann 37 held that there is no reason to differentiate the computer and the software as the latter is an integral part of the former. The software cannot be seen in isolation delinked from the computers. Similar view has been taken by the Co-ordinate bench of ITAT in the case of Make My Trip (India) Pvt. Ltd. Vs DCIT in ITA No. 6055/Del/2010 and Globe Capital Market Ltd. Vs CIT in ITA No. 2926/Del/2012. The issue of depreciation @60% on the software is now a settled issue beyond any perplexity. Hence, we decline to interfere with the order of the Id. CIT (A).

**Employee Compensation Expenses:**

15. For the ground relating to claim in respect of Employee Stock Option Scheme compensation (ESOP expenses) of Rs.66.33 crores, the assessee relied on the decision of the Special Bench of ITAT (Bangalore), in the case of M/s Biocon Ltd. Argues that in that order, a comprehensive over-view of

the legal position regarding allowability of ESOP expenses has been made by the ITAT in the light of applicable accounting and taxation principles. The decision has since been approved by the Hon'ble Jurisdictional High Court of Delhi in the case of M/s Lemon Tree Hotels Limited. Hence, it was reiterated that the claim of ESOP expenses is an allowable expenditure u/s 37(1) of the Act.

16. The Id. DR argued that ESOP expenditure claimed by the assessee is not allowable in this year by going through the details furnished by the assessee in the paper book.

17. Heard the arguments of both the parties and perused the material available on record.

18. The Special Bench of ITAT examined the following issues:

\*Whether any deduction of discount given on shares is allowable?

\*If Yes when and how much?

\*Subsequent adjustment to discount?

19. The Tribunal examined the issue from the perspective of capital expenditure as laid down by the Delhi bench in the case of Ranbaxy Laboratories Ltd. Vs Addl. CIT 39 SOT 17. It was held in VIP Industries Vs DCIT in ITA No. 7242/Mum/2008 that the short receipt of premium on receiving option to the employee will be notional loss but not actual loss for which any liability has incurred. The Chennai Bench of the Tribunal in SSI Ltd. Vs DCIT 85 TTJ 1049 wherein granting of deduction of the discount on shares was treated as employee cost. The order has

been relied upon by the order of the Hon'ble High Court of Madras in the case of CIT Vs PVP Ventures Ltd. 211 Taxmann 554.

20. It was held the amount of discount represents the difference between market price of the shares at the time of the grant of option and the offer price. In order to be eligible for acquiring the shares under the ESOP, the concerned employees are obliged to render services to the company during the vesting period as given in the scheme.

21. The Special Bench held that the discounted premium on shares is a substitute to giving direct incentive in cash for availing the services of the employees. There is no difference in the situations,

(a) when the companies issues shares to public at market price and a part of premium is given to the employees in lieu of their services,

(b) When the shares are directly issued to employees at a reduced rate.

22. In both the situations, the employees stand compensated for their efforts. ESOP is one such mode of compensating the employees for their services. Since, it is an expenditure for the company, the same needs to be allowed u/s 37(1) of the Act.

23. As to when and how much deduction is to be claimed, the Special Bench observed that the period from grant of option to the vesting of option is the vesting period and it is during such period that an employee is supposed to render the service to the company so as to earn and entitlement to the shares at a

discounted price. If the vesting period is, say, four years with equal vesting at the end of each year, then it is at the end of the vesting period or during the exercise period, which in turn immediately succeeds the vesting period, that the employee becomes entitled to exercise 100 options or qualify for receipt of 100 shares at discount. Though the shares are allotted at the end of the vesting period, but it is during such vesting period that the entitlement is earned. It means that 25 options vest with the employee at the end of each year on his rendering service for the respective year. If during the interregnum, he leaves the service, say after one year, he will still remain entitled to exercise option for 25 shares at the discounted premium at the time of exercise of option. In that case, the benefit which would have accrued to him at the end of the second, third and fourth years would stand forfeited. Thus, it becomes abundantly clear that an employee becomes entitled to the shares at a discounted premium over the vesting period depending upon the length of service provided by him to the company. In all such schemes, it is at the end of the vesting period that option is exercisable albeit the proportionate right to option is acquired by rendering service at the end of each year.

24. The contra situation to the company is such that the obligation falls on the company to allot shares at the time of exercise of the option depending upon the length of the service rendered by the employee during the vesting period. The Special Bench held that such discount is deductible over the vesting period on straight line basis.

**25. To sum up, it was held that the discount under ESOP is in the nature of employee cost and hence deductible during the vesting period.**

26. From the details filed in the case Indiabulls Real Estate Ltd., we find that two schemes have been issued by the assessee namely, IBREL ESOP 2006 and IBREL ESOP 2007. The spread of ESOP 2006 was from FY 2006-07 to 2013-14 whereas ESOP 2008 spread from FY 2008-09 to FY 2009-10. The assessee has also given the details of date of vesting, number of shares granted, number of shares vested, perk value, taxed in the hands of employees, period of vesting. The perk value of the share ranged from Rs.635/- to Rs.134/- and Rs.101/-. The perk value of the share on the date of vesting i.e. 01.11.2011 was Rs.6158/-. The discount given in the ESOP 2008 scheme was Rs.110.50. Further, no material was placed as to what was the value of the shares as per the market at different years of vesting (page 143 to 154 PB). The details in the case of Indiabulls Real Estate Ltd. are as per the table below:

| Scheme Name          | ESOP Exp (FY 06-07) | ESOP Exp (FY 07-08) | ESOP Exp (FY 08-09) | ESOP Exp (FY 09-10) | ESOP Exp (FY 10-11) | ESOP Exp (FY 11-12) | ESOP Exp (FY 12-13) | ESOP Exp (FY 13-4) |
|----------------------|---------------------|---------------------|---------------------|---------------------|---------------------|---------------------|---------------------|--------------------|
| IBREL-ESOP-2006      | 246,370,340         | 354,992,832         | 41,052,997          | 12,051,561          | 3,051,602           | 210,003             | 96,248              | 33,613             |
| IBREL-ESOP-2008      |                     |                     | 929,482             | 4,740,358           |                     |                     |                     |                    |
| Total                | 246,370,340         | 354,992,832         | 41,982,479          | 16,791,920          | 3,051,602           | 210,003             | 96,248              | 33,613             |
| Cumulative ESOP Cost | 246,370,340         | 601,363,172         | 643,345,652         | 660,137,571         | 663,189,173         | 663,399,176         | 663,495,423         | 663,529,036        |
| Deduction allowed    | NIL                 | NIL                 | NIL                 | NIL                 | NIL                 | NIL                 | NIL                 | NIL                |

27. The details in the case of Indiabulls Financial Services Ltd. are as under:

| Scheme Name                     | ESOP Exp<br>(FY 06-07) | ESOP Exp<br>(FY 07-08) | ESOP Exp<br>(FY 08-09) | ESOP Exp<br>(FY 09-10) | ESOP Exp<br>(FY 10-11) | ESOP Exp<br>(FY 11-12) | ESOP Exp<br>(FY 12-13) | ESOP Exp<br>(FY 13-14) |
|---------------------------------|------------------------|------------------------|------------------------|------------------------|------------------------|------------------------|------------------------|------------------------|
| IBFSL-ICSL-ESOP-2006            |                        | 3,48,85,665            | 2,24,47,263            | 1,21,14,310            | 85,79,747              | 59,82,085              | 34,64,530              | 18,89,433              |
| IBFSL-ICSL-ESOP-II-2006         | 24,78,799              | 36,87,969              | 30,94,563              | 20,30,218              | 14,77,803              | 10,59,274              | 7,54,296               | 3,07,713               |
| ESOP-2008                       |                        |                        | 2,93,81,331            | 8,24,45,171            | 5,00,,08,02            | 3,65,99,755            | 2,46,69,301            | 94,81,686              |
| ESOP-2008-Regrant-125-90        |                        |                        |                        | 2,36,164               | 8,65,288               | 5,32,190               | 3,04 ,022              | 41,485                 |
| ESOP-2008-Regrant-158-50        |                        |                        |                        |                        | 11,07,336              | 14,32,554              | 11,34,952              | 9,90,919               |
| ESOP-2008-Regrant-153-65        |                        |                        |                        |                        | 5,03,308               | 22,55,792              | 16,24,534              | 2,68,255               |
| IBPSSL-ICSL-ESOP-2006-Regrant   |                        |                        |                        | 54,30,664              | 81,28,900              | 71,25,968              | 63,38,096              | 44,33,448              |
| IBFSL-ICSL-ESOP-II-2006-Regrant |                        |                        |                        | 28,57,241              | 42,99,699              | 38,05,747              | 34,05,190              | 23,74,034              |
| TOTAL                           | 24,78,799              | 3,85,73,635            | 5,49,23,158            | 10,51,13,769           | 7,49,70,109            | 5,87,93,364            | 4,16,95,519            | 1,97,86,972            |
| Cumulative ESOP Cost            |                        | 4,10,52,433            | 9,59,75,591            | 20,10,89,360           | 27,60,59,469           | 33,48,52,833           | 37,65,48,352           | 39,63,35,325           |
| Actual ESOP Cost, allowed       | NIL                    | NIL                    | NIL                    | NIL                    | NIL-Claim made         | NIL                    | NIL                    | 39,63,35,325           |

28. Hence, while laying down the principle that the discount offered on the shares under the ESOP of scheme is allowable deduction u/s 37(1) of the Act, we hereby remand the matter to the file of the AO for the limited purpose of arithmetic calculation of apportioning the year wise discount over the period of vesting taking into consideration, the options granted to the employees, determination of the perk value, FBT levied and allow the same as per the provisions of the Income Tax Act, 1961.

29. The ratio on the issues in ITA No. 6602/Del/2016 would be applicable *mutatis mutandis* to the similar issues in ITA No. 6603/Del/2016.

30. In the result, both the appeals of the revenue are dismissed.

Order Pronounced in the Open Court on 11/03/2020.

Sd/-

**(Amit Shukla)**  
**Judicial Member**

**Dated: 11/03/2020**

\*Subodh\*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

**(Dr. B. R. R. Kumar)**  
**Accountant Member**

**ASSISTANT REGISTRAR**