

**IN THE INCOME TAX APPELLATE TRIBUNAL  
"A" Bench, Mumbai**

**Before Shri D.K. Agarwal (JM) and Shri Rajendra Singh (AM)**

**ITA No. 4831/M/2005  
Assessment Year:2002-2003**

M/s. Essar Investments Limited,  
Essar House,  
11, Keshavrao Khadye Marg,  
Mahalaxmi,  
Mumbai – 400 034.

**PAN: AAACE1491Q**  
(Appellant)

Deputy Commissioner of Income  
Tax,  
Range 5(1),  
Room No. 568/525,  
Aayakar Bhavan,  
Mumbai – 400 020.

(Respondent)

**ITA No. 5001/M/2005  
Assessment Year:2002-2003**

Deputy Commissioner of Income  
Tax,  
Range 5(1),  
Room No.568/525,  
Aayakar Bhavan,  
Mumbai – 400 020.

M/s. Essar Investments Limited,  
Essar House,  
11 Keshavarao Khadye Marg,  
Mahalaxmi,  
Mumbai – 400 034.

PAN: AAACE1491Q  
(Respondent)

Assessee by:  
Revenue by:

Shri Vijay Mehta  
Mrs. Usha Nair

Date of hearing:

2-11-2011

Date of pronouncement:

7-12-2011

**ORDER**

**PER D.K. AGARWAL (JM):**

These cross appeals by the assessee and Revenue are directed against the order dated 6.5.2005 passed by the Ld. CIT

(A) for the assessment year 2002-2003. Both these appeals are disposed of by this common order for the sake of convenience.

2. Briefly stated facts of the case are that the assessee derives income from Hiring of Cranes to ONGC and other oil refineries, management services to group companies, dividends and interest from investments and income from sale of investment and Trading in shares. It filed return declaring loss of Rs.56,78,74,068/-. However, the assessment was completed under normal provisions of the Act at loss of Rs. 31,39,57,516/- and u/s 115JB at loss of Rs.54,13,66,418/- including the disallowance of interest related to shares Rs.17,32,53,552/- and disallowance of interest on interest free loans Rs.8,06,63,000/-.

3. On appeal, the Ld. CIT (A) while directing the AO to follow the appellate order for the assessment years 1999-2000 and 2001-02, partly allowed the appeal.

4. Being aggrieved by the order of the Ld. CIT (A), the assessee and Revenue both are in appeal before us.

5. Ground Nos. 1,2 and 3 in assessee's appeal are against the sustenance of disallowance of interest related to u/s 14A and Ground No.1 in Revenue's appeal is against the relief allowed by the Ld. CIT (A) in respect of disallowance made u/s 14A of the Act.

6. Briefly stated facts of the case are that during the assessment proceedings the AO observed that the assessee had made an investment to the extent of Rs. 469.79 Crores out of which investments amounting to Rs. 419.40 Crores were made in shares of Indian companies of the same group. It has been further observed that the income therefrom will be earned either as non taxable dividend income, or the income would be earned as capital gains on the transfer of such shares. In case of sale of shares expenses related to acquisition or improvement only would be eligible for deduction and not interest incurred on such borrowed funds for acquisition of the shares. From the profit and loss account filed it was further observed by the AO that the assessee had paid total interest and finance charges amounting to Rs. 44.47 crores. Total borrowed funds were amounted to Rs. 739.76 crores. According to the AO, the assessee had invested borrowed funds in acquisition of shares, income from which is exempt as aforesaid, therefore, he disallowed the prorata interest of Rs. 17,32,53,552/- based on the working given by him in the impugned assessment order.

7. On appeal, the Ld. CIT (A) observed that the similar issue was considered by him in the appellant's own case for the assessment years 1999-2000 & 2001-2002 wherein he has calculated the disallowance to be made in the appellants case

and there is no material change in the facts and hence he directed the AO to calculate the disallowance of interest on the basis adopted by him in the order dated 6.3.2003 for assessment year 1999-2000.

8. At the time of hearing, the learned counsel for the assessee while explaining the issue from the assessment order submits that this issue is covered in favour of the assessee by the order of the Tribunal in the assessee's own case in M/s. Essar Investments Limited V/s Jt.CIT (OSD) & vice-versa in ITA No.4023/M/2003, ITA No.4024/M/2003, ITA No.5723/M/2004, ITA No.3841/M/2003, ITA No. 3842/M/2003 and ITA No.6154/M/2004 for the assessment years 1998-99, 1999-2000 and 2001-2002 order dated 9.7.2008 wherein the Tribunal while deleting the disallowance sustained by the learned CIT (A) dismissed the Revenue's appeal. He further submits that recently the Tribunal in the assessee's own case in ITA No.4133/M/2009 for AY 2005-2006 order dated 15.6.2011 has again considered the similar issue in the light of recent decision of Hon'ble jurisdictional High Court in the case of Godrej and Boyce Manufacturing Company Ltd. vs. DCIT (2010) 328 ITR 81 (Bom) and has set aside the issue to the file of the AO to decide the same de novo after considering the decision of the Tribunal in the assessee's own case and all the contentions of the assessee. He further submits that he has no objection if the

issue is set aside to the file of the AO to decide the same in the light of the said order of the Tribunal which was not objected to by the Ld. DR.

9. Having carefully considered the submissions of the rival parties and perusing the material available on record we find that there is no dispute that the decision of the Tribunal in the assessee's own case for the AYs 1998-1999, 1999-2000 and 2001-2002 dated 9.7.2008 is prior to the decision of the Hon'ble Jurisdictional High Court in the case of Godraj & Boyce Manufacturing Co. Ltd. (supra) wherein their lordships after considering the decision of the Tribunal in Daga Capital Management Pvt. Ltd. (117 ITD 169) (Mum) (Special Bench) while holding that the provision of sub-section (2) & (3) of sec.14A of the Act are constitutionally valid have held vide placitum 88(vi) appearing at page 138 of the 328 ITR as under:

“ (vi) Even prior to Assessment Year 2008-09, when Rule 8D was not applicable, the Assessing Officer has to enforce the provisions of sub section (1) of section 14A. For that purpose, the Assessing Officer is duty bound to determine the expenditure which has been incurred in relation to income which does not form part of the total income under the Act. The Assessing Officer must adopt a reasonable basis or method consistent with all the relevant facts and circumstances after furnishing a reasonable opportunity to the assessee to place all germane material on the record;”

10. In assessee's own case in Essar Investments Ltd. vs. ACIT in ITA No. 4133/M/2009 for AY 2005-06 dated 15.6.2011 the Tribunal vide Para 4 of its order has held as under:

"We have heard the parties. The Ld. Counsel for the assessee submits that the entire investment in the shares made by the assessee company for the strategic purpose. He further submits that in the preceding year as well as in the subsequent year, identical disallowances were made but the Tribunal has deleted the additions. Now the scope of section 14A has been examined and explained by the Hon'ble jurisdictional Bombay High Court in the case of Godrej & Boyce Manufacturing Company Pvt. Ltd. 234 CTR (Bom) 1, the Hon'ble High Court has held that Rule 8D has no retrospective operation. Both the parties agreed that matter may be set aside to the file of Assessing Officer for fresh adjudication keeping the issue open. We, therefore, set aside the issue and restored the issue to the file of Assessing Officer to decide the same de novo after considering the decision of the Tribunal in assessee's own case in the preceding assessment year as it is contended by the Ld. Counsel that the Tribunal has deleted the addition on the identical set of facts. The Assessing Officer has to take into consideration the decision of the jurisdictional High Court in the case of Godrej & Boyce Manufacturing Co.Pvt. Ltd. The Assessing Officer should consider all the contentions of the assessee and accordingly decide the issue of disallowance u/s 14A of the Act. Needless to say that the Assessing Officer shall afford a reasonable opportunity of being heard to the assessee. Accordingly, Ground No.1 is allowed for statistical purposes."

11. In the absence of any distinguishing feature brought on record by the parties we respectfully following the aforesaid decisions set aside the orders passed by the Revenue authorities on this account and send back the matter to the file of the AO to decide the same de-novo in the light of the directions given in the above decisions and according to law after providing reasonable opportunity of being heard to the assessee. The Ground Nos. 1,2,3 taken by the assessee and Ground No. 1 taken by the Revenue are, therefore, partly allowed for statistical purposes.

12. Ground No.4 in assessee's appeal is against the sustenance of disallowance of interest on interest free loans and Ground No. 2 in Revenue's appeal is against the relief allowed by the Ld. CIT (A) out of the disallowance of interest on interest free loans.

13. The brief facts of the above issue are that it was interalia observed by the AO that the assessee had made advances to following companies on which no interest was charged whereas the assessee has used its owned and borrowed funds for all such advances.

a)	Essar Steel Ltd.	Rs. 206.31 Crores
b)	Essar Power Ltd.	Rs. 133.14 Crores
c)	Interest bearing ICD's	Rs. 2.00 Crores
d)	Advance against investment	<u>Rs. 0.60 Crores</u>
	Total	<u>Rs. 341.51 Crores.</u>

On being asked it was submitted by the assessee that the above advances were given to concerns for which the assessee was involved as a promoter. However, according to the AO, the assessee could not explain as to how interest free advances given to these companies be considered for the business purposes as the business funds were diverted for non business purposes. According to AO the interest claimed by the assessee would not be allowed as deduction u/s 36(1)(iii). The AO relied on judgments of various High Courts in this regard. After

arriving at this conclusion, the AO listed the total assets on 31.3.2002 and 31.3.2001 and worked out the average of both. Further AO worked out head-wise % of the total assets and % relating to loans and advances accordingly, and applied the % so arrived at, to the total interest and worked out a figure of Rs. 8,06,63,000/- (after reducing the interest received therefrom) which he disallowed and added to the total income of the assessee.

14. On appeal, the Ld. CIT (A) observed that the similar issue was decided by him in the appellant's own case in AYs 1999-2000 and AY 2001-2002. In line with the same he directed the AO to disallow the interest as calculated in accordance with the calculation adopted by him in the order dated 6.3.2003 for AY 1999-2000. He further directed the AO to verify the appellant's claim for inter corporate loans of Rs. 2 crores is interest bearing. If the contention of the assessee is found to be correct in that event he directed the AO to delete the proportionate disallowance of interest made by him on the same.

15. At the time of hearing the Ld. counsel for the assessee submits that this issue is covered in favour of the assessee by the decision of the Tribunal in the assessee's own case for the AY 1998-1999, 1999-2000 and 2001-2002 (supra) wherein the Tribunal after considering the decision of Hon'ble Supreme Court



in the case of SA Builders Ltd. vs. CIT (A) (2007) 288 ITR 1(SC) has deleted the disallowance made by the AO. It was further submitted that the similar view has been followed by the Tribunal in the assessee's own case in ITA No. 5083 & 5642/M/2007 for the AYs 2000-2001 & 2003-2004 order dated 11.12.2009. The learned counsel for the assessee has also placed on record the copy of the said order of the Tribunal.

16. On the other hand, the Ld. DR supports the order of the AO.

17. Having carefully considering the submissions of the rival parties and perusing the material available on record, we find that the facts are not in dispute. We find merit in the plea of the learned counsel for the assessee that on the identical facts the Tribunal in the assessee's own case for the assessment years 1998-1999, 1999-2000 & 2000-2002 vide para 23 of the order dated 9.7.2008 has held that the assessee had advanced the loans to the group concerns for its business purpose, in such a case, interest on such advances cannot be disallowed. The similar view has been followed by the Tribunal in the assessee's own case in ITA No. 5083 & 5642/M/2007 for AYs 2000-2001 & 2003-2004 dated 11.12.2009. In the absence of any distinguishing feature brought on record by the Revenue, we respectfully following the ratio of decision of the Hon'ble Supreme Court in SA Builders (supra) and the consistent view of

the Tribunal hold that the assessee has advanced the interest free loans to the group concerns for its business purposes and hence interest on such interest free advances cannot be disallowed and accordingly we delete the disallowance of interest sustained by the Ld. CIT (A). The ground taken by the assessee is, therefore, allowed and the ground taken by the Revenue stands rejected.

18. In the result, assessee and Revenue's appeals stand partly allowed for statistical purposes.

The order was pronounced in open court on 7th Dec., 2011.

Sd

**(RAJENDRA SINGH)**  
**ACCOUNTANT MEMBER**

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**(D.K.AGARWAL)**  
**JUDICIAL MEMBER**

Date : 7th December, 2011.  
At : Mumbai

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Copy to :

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

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By Order

Assistant Registrar  
ITAT, Mumbai Benches, Mumbai