**IN THE INCOME TAX APPELLATE TRIBUNAL**

**DELHI BENCH 'C' NEW DLEHI**

**BEFORE SHRI N.K. SAINI, ACCOUNTANT MEMBER**
**AND**
**SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER**

**I.T.A. Nos.5767 & 5768/Del/2016**
**Assessment Years: 2008-09 & 2009-10**

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|---|---|---|
| **The Nainital Bank Ltd.**<br>**7 Oaks, Mallital, Nainital.**<br>**(PAN:AAACT5714D)** | **vs** | **Asstt. Commissioner of Income-tax**<br>**Circle -3, Nainital.** |

**I.T.A. Nos.5347 & 5348/Del/2016**
**Assessment Years: 2008-09 & 2009-10**

| | | |
|---|---|---|
| **Asstt. Commissioner of Income-tax**<br>**Circle -3, Nainital.**<br>(Appellant) | **vs** | **The Nainital Bank Ltd.**<br>**7 Oaks, Mallital, Nainital.**<br>**(PAN:AAACT5714D)**<br>(Respondent) |

Assesseet by: S/Shri K.R. Rastogi & Shubham Rastogi
Respondent by: Shri S.S. Rana, CIT- DR

Date of hearing: 03.04.2018
Date of Pronouncement: 06 .04.2018

**ORDER**

**PER BENCH**

I.T.A Nos.5347/Del/2016 and 5767/Del/2016 relate to the assessment year 2008-09 filed by the revenue and the assessee respectively challenging the order dated 28.7.2016 passed by the learned Commissioner of Income-tax(A), Haldwani

Delhi {for short "ld.CIT(A)") in Appeal No.191/CIT(A)/HLD/2015-16; whereas ITA Nos. I.T.A Nos.5348/Del/2016 and 5768/Del/2016 relate to the assessment year 2009-10 filed by the assessee and the revenue respectively challenging the order dated 28.7.2016 passed by the ld. CITA) in Appeal No.192/CIT(A)/HLD/2015-16. Since the parties and the question of fact involved in this matter was substantially the same, we deem it just and convenient to pass a common order.

2. Briefly stated facts are that after conclusion of the assessment u/s 143(3) of the Income-tax Act, 1961 (for short "the Act") for respective years, learned AO recorded reasons dated 26.2.2015 and 19.2.2015 respectively in respect these two asstt. Years stating that subsequent to the completion of the assessment u/s 143(3) of the Act, it was noticed that the assessee did not disclosed the method of arriving at the disallowance made u/s 14A during the course of assessment proceedings, the assessment was framed with the same figure of disallowance as furnished by the assessee and since the assessee did not disclose the method of arriving at the disallowance u/s 14A of the Act either in the return of income or during the course of assessment proceedings, it resulted into the failure on the part of the assessee to disclose fully and truly all the material facts necessary for its assessment and that the disallowance warranted under Rule 8D(2)(ii) of the Income-tax Rules, 1962 (for short "the Rules") could not be considered and thereby it escaped assessment. On this premise, learned AO proceeded to reopen the concluded assessment and passed orders u/s 143(3) read with 147 of the Act making additions on that account.

3. When the assessee carried the matter in appeal before the learned CIT(A), by way of impugned orders, learned CIT(A) held that the reopening of the proceedings was valid but, however, inasmuch as the interest free funds of the

assessee are far exceeding the investment during the relevant years, question of invoking the provisions under Rule 8D directly and mechanically does not arise. He further recorded that a similar question had arisen in assessee's own case on earlier occasions also and the Tribunal as well as the High Court of Uttarakhand recorded a finding that for Section 14A to apply, there should be a direct nexus between the earning of income and incurring of expenditure and the expenditure incurred should be in relation to income which does not form part of the total income and when the assessee denied to have the interest expenditure in relation to earning of investment in tax free bonds, attribution of any portion of interest without identifying which part of borrowed fund was utilized for investment in tax free bonds, is not envisaged in law. On this ground, he directed the learned AO to delete the additions made under Rule 8D(2)(ii) of the Rules.

4. Challenging the deletion of the addition by applying the Rule 8D(2)(ii) of the Rules, Revenue preferred these appeals whereas challenging the validity of reopening of proceedings as sustained by the learned CIT(A), the assessee is before us in the other two appeals.

5. It is the argument of the learned AR that the reopening proceedings are bad because in both the years, the AO was aware of the earning of the tax free amount by the assessee and also incurring the administrative expenses which was disallowed for both the years at 0.5% of the average investment. As a matter of fact, for the AY 2008-09, there was a query in this respect which was answered by the assessee and basing on that learned AO disallowed a sum of Rs.17,16,318/-. And also in that process the assessee brought it to the notice of the learned AO that in respect of Asstt. Year 2009-10, the assessee themselves complied with the

requirement of disallowance under Rule 8D of the Rules. Inasmuch as this issue was considered while framing the assessment u/s 143(3) of the Act, it is not open for the learned AO to propose reopening in respect of very same issue without coming into possession of any fresh tangible material.

6. The learned DR placed reliance on the decisions reported in the cases of Greenwell Orchard vs ITO (2017), 82 taxmann.com 461 (Guj); Honda Siel Power Products Ltd. vs DCIT (2012) 340 ITR 64 (SC); ); Honda Siel Power Products Ltd. vs DCIT (2012) 340 ITR 53 (SC); New Delhi Television Ltd. vs DCIT (2017) 84 taxmann.com 136 (Del); CIT vs P.V.S. Bedies (P) Ltd. (1999) 237 ITR 13 (SC); Pranawa Leafin (P) Ltd. vs DCIT (2013) 215 Taxman 109 (Bom); CIT vs Kiranbhai Jamnadas Sheth (HUF) (2013) 221 Taxman 19 (Guj); and Dishman Pharmaceuticals & Chemicals Ltd. vs CIT (2012) 346 ITR 228 (Guj) for the proposition that assessee having not pointed out during assessment proceedings about expenses incurred relatable to tax free income u/s 14A, there was omission and failure on its part to disclose fully and truly material facts and hence, reopening of assessment was justified.

7. We have gone through the record. As a matter of fact Para 7 of the asstt. Order dated 24.11.2010 passed u/s 143(3) of the Act in respect of Asstt. Year 2008-09 reads as follows:

> " 7. Issue of disallowance u/s 14A:
>
> 7.0 During assessment proceedings an examination of the material available on record and also from the books of account of the assessee it was pin pointed that assessee has not added back a sum of Rs. 17,16,318/- u/s 14A of the I.T. Act, 1961. Accordingly the assessee was asked to explain as to why this amount may not be added back to the return income of the assessee.

7.1 On this issue the assessee submitted as under: -

"In the Return of Income have not made disallowance regarding Section 14A of Income Tax Act 1961. This was based on the assumption like past that the investment made during the year is out of the Interest Free Funds available. Rule 8D was introduced by the IT (Fifth Amendment) Rule, 2008 w.e.f. 24.03.2008. We were under the impression that this Rule will be Relevant For AY 2009-10 and accordingly we have made proper disallowance as per Rule SD in AY 2009-10.

During this year we were under impression that this provision is not applicable. We have taken proper Legal Advice on this issue and accordingly we are disallowing Rs.17,16,318/- being inadmissible u/s 14A of IT Act 1961. The working is enclosed herewith.

We are submitting Corrected Computation Chart after considering the disallowance u/s 14Aof IT Act regarding income of the Bank. It is requested, to compute the income as per this corrected computation chart. Due taxes on this income has already been paid as our Refund amount will become less accordingly.

It is prayed that the mistake is unintentional as we are confused with the New Provision brought on Record w.e.f. 24.03.2008. Accordingly it is prayed to kindly do not initiate penalty proceedings.

**Thanking You,**
**Yours faithfully,**

**(RAVINDRA SAXENA)**
**Chief Manager, Taxation**
**Place: Nainital"**

Without prejudice to my separate finding on the issue of initiation of penalty the disallowance u/s 14A is computed as under: -

| | As on 1.4.2007 | As on 31.3.2008 | |
|---|---|---|---|
| MF | 1,40,000/- | 4,63,087/- | |
| Tax Free bonds | 42,970/- | 40,470/- | |
| Total | 1,82,970/- | 5,03,557/- | 6,86,527/- |
| Average Investment | 687527/2 | | 3,43,264/- |
| Inadmissible exp. u/s 14A @0.5% | | | 17,16,318/- |

> As the assessee has not included inadmissible expenses u/s 14A neither in the original return nor in the revised return and it was only after pin pointing during assessment proceedings that the assessee volunteered for this disallowance. The assessee is held guilty of furnishing inaccurate particulars of income and also concealment of income, initiate penalty u/s 271(l)(c).
>
> (Add: **Disallowance** of Rs. 17,16,318/)"

8. It is, therefore, clear that the learned AO is aware of the assessee earning tax free income and the applicability of Rule 8D for the Asstt. Years 2008-09 and 2009-10 for that matter. The assessee themselves allowed some disallowance in respect of the Asstt. Year 2009-10 whereas the learned AO made an addition of Rs.17,16,318/- in respect of the Asstt. Year 2008-09.

9. It, therefore, does not admit any doubt that in so far as the facts are concerned, absolutely there is no dispute that being aware of the applicability of Rule 8D for the Asstt. Years 2008-09 and 2009-10, AO calculated the disallowance under Rule 8D and paragraph 7.1 above indicates that the AO reached the figure of Rs.17,16,318/- as the amount disallowable u/s 14A of the Act. When a query was raised and was complied with by the assessee, if any order is based subsequently with reference to such query also, it does not leave any doubt in our mind that there is application of mind on the part of the AO passing the order in respect of the issue covered by the query. When the assessee furnished all the facts and figures including the earning of the tax free income and the expenditure which was accepted by the learned AO, it is not open for the AO to say that the income escaped assessment because assessee did not reveal the method of arriving at the disallowance made u/s 14A during the assessment proceedings. The assessment proceedings are meant for verification of such thing and to say that no income has escaped assessment in so far as the facts and figures revealed

in the return of income. If the AO accepts a figure under Rule 8D of the Rules in the order u/s 143(3) of the Act inasmuch as Section 14A and Rule 8D there on the statute book, the AO cannot say that since the assessee did not disclose the method of calculation, income escaped from assessment. The method to be followed is available in the shape of the provisions of Rule 8D of the Rules.

10. In the circumstances, we are of the considered opinion that the entire material is available before the AO when he framed the assessment u/s 143(3) of the Act and being aware of the assessee earning tax free income and incurring some expenditure, the AO accepted the expenditure offered by the assessee under Rule 8D of the Rules, as such, in the absence of any fresh tangible evidence to suggest that the assessee is guilty of not disclosing fully and truly all the material facts necessary for the assessment, it is not open for the AO to reopen the proceedings. Facts are revealed by the assessee and the method is contemplated by the Statute, as such, the assessee not revealing the method of calculation in no way resulted in any income being escaped from assessment. Any reason recorded by the AO on this aspect at a later point of time is only a change of opinion.

11. We are fortified our this conclusion by the decisions of the Hon'ble jurisdictional High Court in the case of M/s Sun Pharmaceuticals Industries Ltd., 381 ITR 387 (Del); H.C.L. Technologies Ltd., 397 ITR 469 (Del); decision of Hon'ble Gujarat High Court in the case of Kumari Aditi Janmejay Vyas, 89 taxmann.com 336; and the decision of Bombay High Court in the case of Godrej Industries Ltd., 58 Taxmann.com365 wherein it is held that in so far as the assessee had disclosed the interest expense in the Profit & Loss account and investment in the balance

sheet and also disclosed exempt income in the returns, there is no failure on the part of the assessee to disclose all the material facts necessary for assessment and having accepted the same, the AO does not get jurisdiction to reopen the assessment beyond the period of four years and such a course is not permissible under law. In view of the facts and circumstances adverted to above and the case laws referred to, we are of the considered opinion that reopening of the proceedings in the matter are not in accordance with law and we find it difficult to sustain the same.

12. Even otherwise, in so far as the merits are concerned, there is no dispute as to the fact recorded by the learned CIT for both the years that there was an average balance in the current account of the assessee in bank to the tune of Rs.142.51 crores for the Asstt. Year 2008-09 and Rs.130.27 crores in respect of Asstt. Year 2009-10 whereas the investment in interest free funds is Rs.34.32 crores for Asstt. Years 2008-09, and Rs.66.82 crores for Asstt. Year 2009-10 which constitute only 11.19% for Asstt. Year 2008-09 and 18.82% for the asstt. Year 2009-10 respectively. This fact is well demonstrated with reference to the financials of the assessee incorporated in the paper book. For that matter, the revenue does not dispute this factual finding nor did place any material on record to brush such factual finding aside. Having found so, learned CIT(A) placed reliance on the judicial precedence in the matter and also recorded that the identical issue had arisen in assessee's own case in respect of Asstt. Year 2012-13. Basing on the observations of the first appellate authority in that case and also relying on the decision in CIT vs HDFC Bank Ltd., 366 ITR 505, learned CIT(A) observed that when the own funds of the assessee far exceeds the investment, the presumption is that the investment is made from the interest free funds

available with the assessee and no question of any addition under Rule 8D(2)(ii) arises. We do not find any irregularity or illegality in this approach and reasoning of the learned CIT(A) or the conclusion reached by him. We find ourselves in agreement with such conclusion.

13. It is, therefore, clear that viewing from any angle, the addition made by the AO under Rule 8DE(2)(ii) cannot be sustained. For the reasons recorded in the preceding paragraphs ITA Nos.5767 & 5768/Del/2016 preferred by the assessee stand allowed whereas ITA Nos.5347 & 5348/Del/2016 preferred by the revenue stand dismissed.

14. In the result, appeals of the assessee for both the assessment years are allowed whereas the appeals of the revenue for both the years are dismissed.

**Order pronounced in the Open Court on 6th April, 2018.**

**Sd/-** **sd/-**

(N.K. SAINI)
ACCOUNTANT MEMBER

(K. NARASIMHA CHARY)
JUDICIAL MEMBER

Dated: 6th April, 2018
'VJ'

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

By order

Asstt. Registrar, ITAT