IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH "D" DELHI)

BEFORE SHRI G.E. VEERABHADRAPPA, HON'BLE VICE PRESIDENT AND SHRI A.D. JAIN, JUDICIAL MEMBER

ITA NO. 814(Del)2011
Assessment year: 2008-09

The Dy.Commissioner of Income Tax, Circle 4(1), New Delhi.	V.	M/s. Jindal Photo Limited, 11/5-B, Basement, Opp. Telephone Exchange, Pusa Road, New Delhi-05.

C.O. No.91(Del)2011
(In ITA No. 814(Del)2011)
Assessment year: 2008-09.

M/s. Jindal Photo Limited, 11/5-B, Basement, Opp. Telephone Exchange, Pusa Road, New Delhi-05.	V.	The Dy.Commissioner of Income Tax, Circle 4(1), New Delhi.
(Appellant)		(Respondent)

Department by: Shri R.S. Negi, Sr. DR
Assessee by: Shri Rupesh Saini, Adv.& Shri Gaurav Jain, CA

ORDER

PER A.D. JAIN, J.M.

This is Department's appeal and the cross objections are by the assessee. The Department has taken the following grounds:-

"1. The order of the ld. CIT(A) is erroneous and contrary to facts and law.

2. On the facts and in the circumstances of the case and in law, the ld. CIT(A) has erred in deleting the addition of ` 2,29,757/- and ` 4,04,997/- made by the AO by disallowing the deduction u/s 80 IB on account of insurance claimed in respect of Dadra and Sambha Unit.

3. The ld. CIT(A) ignored the fact that the disallowance under section 14A was worked out by the AO in accordance with the provisions of Rule 8D of Income Tax Rules, 1962."

2. The assessee has taken the following cross objections:-

"1. That the CIT(A) erred on facts and in law in computing disallowance under section 14A of the Income Tax Act, 1061 ("the Act"), amounting to `19,43,022/-, by applying provisions of Rule 8D of the Income Tax Rules, 1962("the Rules").

2. That the CIT(A) erred on facts and in law in not restricting the disallowance under section 14A to the amount of `13,62,488/-, suo moto disallowed by the appellant in the return of income."

3. Ground No.1 in the Department's appeal is general.

4. Ground No.2 challenges the deletion of the additions of ` 2,29,757/- and ` 4,04,997/- made by the AO by disallowing the deduction u/s 80 IB on account of insurance claimed in respect of Dadra and Sambha Unit of the assessee.

5. The ld. CIT(A) upheld the action of the AO, following his order for assessment year 2007-08, wherein, it had been held as follows:-

> *"5.3 In the light of the binding decisions of Hon'ble jurisdictional Delhi High Court in the case of Shri Ram Honda Power Equipments (supra), which has been followed in a later decision in the case of Delhi Brass & Metal Works Ltd. (supra) and in the light of several decisions of Kerala High Court which has been affirmed by the Hon'ble Supreme Court by way of dismissal of Special Leave Petition as so noted by the Hon'ble Delhi High Court in the case of Shri Ram Honda Power Equipments (supra), and in the light of the decisions of Hon'ble Supreme Court in the case of Liberty India (supra), Pandian Chemicals Ltd.(supra) and other decisions referred to above. It is held that the AO was justified in excluding the interest income pertaining to Dadra and Sambha Units for the purpose of calculation of deduction u/s 80 IB of the Act. As a result, ground of appeal No. 2 is dismissed."*

6. The learned counsel for the assessee has contended before us that the matter now stands covered in favour of the assessee by the Tribunal decision dated 22.12.2010, for assessment year 2007-08 (copy at pages 152 to 158 of the Assessee's Paper Book).

7. The learned DR, on the other hand, has placed strong reliance on the impugned order.

8. In this regard, we find that indeed, the issue has been decided in favour of the assessee by the Tribunal vide its aforesaid order dated 22.12.2010 (authored by one of us – the J.M.). Therein, it has been held as follows:-

> *"11. We find that reliance placed by the CIT(A) on "Spot King India Ltd."(supra) is proper. In that case, the plea of the assessee regarding claim of deduction u/s 80 IB in respect of insurance claim receipt was accepted. The provisions of section 80 IA are in para*

materia with section 80 IB of the Act. "Spot King India Ltd." (supra) being a decision rendered by the jurisdictional High Court of Delhi, is, as such squarely applicable. "Khemka Container Ltd." (supra) relied on by the AO, against the assessee, is a decision of a non-judicial High Court qua-the-assessee, and, as such, it gives way to the case of "Spot King India Ltd.", which has been rendered, as noted, by the jurisdictional High Court of Delhi. Accordingly, ground No.2 raised by the Department is rejected."

9. The facts for the year under consideration being no different from those before the Tribunal in the assessee's case for assessment year 2007-08, we find no reason to differ therefrom. As such, following the aforesaid Tribunal order in the assessee's case for assessment year 2007-08, ground No.2 raised by the Department is rejected.

10. Now. Coming to ground No.3, the Department alleges that the CIT(A) has erred in restricting the addition u/s 14A of the Act to ` 19,43,022, as against that of ` 31,01,542/- made by the AO. This issue was also there before the Tribunal in the assessee's case for assessment year 2007-08. On behalf of the assessee, it has been contended that Rule 8D of the I.T. Rules was not applicable for that year; that however, in the year under consideration, no satisfaction has been recorded by the AO as to how the assessee's calculation is not correct; that however, the AO still went on to apply Rule 8D to the case; that the ld. CIT(A) also applied Rule 8D but gave only part relief to the assessee by reducing the interest, whereas regarding

0.5% of exempt investments, he approved the action of the AO; and that once Rule 8D cannot be applied, the assessee's working is to be accepted.

11. The ld. DR, on the other hand, has strongly supported the impugned order in this regard also, contending that the ld. CIT(A) has excluded security taken from customers .

12. The ld. CIT(A), it is seen, restricted the disallowance u/s 14A to ` 19,43,022/-, calculating the disallowance of expenditure in terms of section 14A read with Rule 8D of the Rules as follows:-

	`
a) Direct expenses attributable to earning of exempt income:	NIL
b) Average exempt investments	37,82,57,180/-
c) Average assets	157,64,90,333/-
d) Interest payments made by the assessee	2,15,625/-
e) Interest disallowed: (d) x (b)/(c) =	51,736/-
f) 0.5% of exempt investments =	18,91,286/-
Total disallowance u/s 14A [(e) + (f)] =	19,43,022/-.

13. The Tribunal (supra), for assessment year 2007-08, had held as follows:-

"17. We have heard the parties on this issue and have perused the material on record. During the year, the assessee had earned exempt dividend income of ` 17,97,010/- in respect of investment made in mutual funds. In the return of income filed, a suo moto disallowance of expenses to the tune of ` 1,73,038/- had been made by the assessee u/s 14A of the Act. In the assessment order, the AO made a disallowance of ` 32,18,475/- by applying the method provided in Rule 8D of the I.T. Rules, 1962. This was done without pointing out any inaccuracy in the method of apportionment or allocation of expenses, as adopted by the assessee. All through, the assessee was maintained that the assessee was during the year, carrying on manufacturing activities at its manufacturing units at several places. Its head office was at Delhi. The assessee had maintained separate books of account for each unit. Common expenses incurred at the head office and the branches were attributed to all the units including the head office. Investment in mutual funds, which gave rise to exempt dividend income, was done through the head office. It was the case of the assessee that to earn such dividend income, no direct expenditure was required and no expenses were incurred to make investment of surplus amounts in mutual funds. The suo moto disallowance had, however, been made by the assessee keeping in consideration, the provisions of section 14A of the Act.

18. Now, as per section 14A(2) of the Act, if the AO, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of expenditure incurred in relation to income which does not form part of the assessee's total income under the Act, the AO shall determine the amount incurred in relation to such income, in accordance with such method as may be prescribed, i.e., under Rule 8D of the I.T. Rules. However, in the present case, the assessment order does not evince any such satisfaction of the AO regarding the correctness of the claim of the assessee. As such, Rule 8D of the Rules was not appropriately applied by the AO as correctly held by the CIT(A). It has not been shown by the AO that any expenditure had been incurred by the assessee for earning its dividend income. Merely, an ad hoc disallowance was made. The onus was on the AO to establish any such expenditure . This onus has not been discharged. In "CIT v. Hero Cycles" (P&H) 323 ITR 518, under similar circumstances, it

was held that the disallowance u/s 14A of the Act requires a clear finding of incurring of expenditure and that no disallowance can be made on the basis of presumptions in "ACIT v. Eicher Ltd." 101 TTJ (Del)369, that it was held that the burden is on the AO to establish nexus of expenses incurred with the earning of exempt income before making any disallowance u/s 14A of the Act. In "Maruti Udyog v. DCIT" 92 ITD 119(Del), it has been held that before making any disallowance u/s 14A of the Act, the onus to establish the nexus of the same with the exempt income, is on the revenue. In "Wimco Seedlings Limited v. DCIT" 107 ITD 267 (Del) (TM), it has been held that there can be no presumption that the assessee must have incurred expenditure to earn tax free income. Similar are the decisions in:

1. *Punjab National Bank v. DCIT, 103 TTJ 908(Del);*
2. *Vidyut Investment Ltd., 10 SOT 284(Del); and*
3. *D.J. Mehta v. ITO, 290 ITR 238(Mum.)(AT).*

19. In view of the above, finding no error with the order of the CIT(A) on the point at issue, the same is hereby confirmed. Ground No.3 is thus rejected."

14. In the year under consideration, it is seen that it is not incorrect when the assessee contends that no satisfaction has been recorded by the AO regarding the assessee's calculation being incorrect. Even so, Rule 8D of the Rules has been applied. This, in our opinion, is not correct. Such satisfaction of the AO is a pre-requisite to invoke the provisions of Rule 8D of the Rules. The ld. CIT(A), therefore, erred in partially approving the action of the AO.

15. Therefore, the grievance of the Department in this regard, by way of ground No.2, is unjustified and is rejected, whereas the cross objections raised by the assessee are justified and accepted as such.

16. In the result, the appeal filed by the Department is dismissed and the cross objections filed by the assessee are allowed.

Order pronounced in the open court on 23.09.2011.

Sd/-	sd/-
(G.E. Veerabhadrappa)	(A.D. Jain)
Vice President	Judicial Member

Dated: 23.09.2011.
*RM

Copy forwarded to:

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

True copy

By order

Deputy Registrar