

आयकर अपीलिय अधिकरण, मुंबई “ए” खंडपीठ में  
Income-tax Appellate Tribunal -“A”Bench Mumbai  
सर्वश्री राजेन्द्र,लेखा सदस्य एवं सी .एन .प्रसाद, न्यायिक सदस्य  
Before S/Sh.Rajendra,Accountant Member and C. N. Prasad,Judicial Member  
आयकर अपील सं./ITA/2671/Mum/2011,निर्धारण वर्ष /Assessment Year:2006-07

Aegis Logistics Limited 403, Peninsula Chambers, Morarjee Mills Compound,G.K. Marg, Lower Parel(W) Mumbai-400 013. <b>PAN:AAACA 3302 N</b>	Vs.	ACIT, Circle-1(1) Mumbai.
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

राजस्व की ओर से / **Revenue by:** Shri S.K. Mishra-DR

अपीलार्थी की ओर से /**Assessee by:** Shri Percy Pardiwala/Ms. Vasanti Patel

सुनवाई की तारीख / **Date of Hearing:** 09/02/2017

घोषणा की तारीख / **Date of Pronouncement:** 15/03/2017

**लेखा सदस्य, राजेन्द्र के अनुसार/ PER Rajendra A.M.-**

Challenging the order,dated 15/12/2010, of the CIT (A)-1 Mumbai the assessee has filed the present appeal.Assessee-company,engaged in the business of manufacturing of chemicals,filed its return of income on 28/11/2006,disclosing a total income of Rs. 14.75 crores.A revised return was filed on 28/03/2008 reducing the long-term capital loss from the returned income.The Assessing Officer(AO)completed the assessment,u/s.143(3)of the Act on 29/12/2008, determining its income at Rs. 14. 85 crores.

2.First ground of appeal is about disallowance made by the AO,u/s. 14 A of the Act.During the assessment proceedings,the AO found that assessee had earned dividend income of Rs.77.78 lakhs,that same was claimed exempt u/s.10 (34) of the Act, that it had disallowed Rs.77,789/-, being 1% of the dividend income is disallowance u/s.14A.The AO,directed the assessee to explain as to why disallowance as per provisions of Rule 8D of the Income Tax Rules,1962 (Rules)should not be made after considering the submission of the assessee,the AO made a disallowance of Rs.10.18 lakhs(Rs.8.65 lakhs as per rule 8D(2)(ii)+Rs.2.46 lakhs-0.5% of average investment).

2.1.Aggrieved by the order of the AO the assessee preferred an appeal before the First Appellate Authority(FAA).Before him,it was argued that investments were made out of surplus funds, that no expenditure had been incurred for earning dividend income,that interest expenditure, considered by the AO for disallowance,was not incurred by the assessee for investment purposes, that loan was taken for specific business activity,that the assessee had on its own made disallow -

ance of Rs.77,789/- while computing the taxable income for the year under appeal. After considering the submission of the assessee other assessment order, the FAA held that the assessee had not furnished any documentary evidence to suggest that the interest expenses of Rs . 261.06 lakhs was incurred for specific purpose, that the AO had rightly invoked the provisions of section 14A. He further held that provisions of Rule 8D were not applicable for the year under consideration. He observed that in view of the judgment of the Hon'ble Bombay High Court delivered in the case of Godrej Boyce Manufacturing Company, the AO should provide reasonable opportunity of hearing to the assessee for determining the expenditure related to income which was not forming part of the total income.

**2.2.** During the course of hearing before us, the AR stated that the assessee had made Suo motu disallowance with regard to exempt income, that the provisions of rule 8D were not applicable for the year under consideration, that the loan was sanctioned for specific purposes, that the assessee had sufficient results and surplus to make investment he referred to the cases of Marico Ltd. (ITA/8858/Mum/2011-AY.2007-08, ITA/8713/Mum/2011, dated 18/05/2016) and Allahabad Bank (ITA/466/Kol/2013-AY.2002-03, dtd. 13/01/2016) and argued alternatively that the disallowance should be restricted to reasonable limit. The Departmental Representative (DR) stated that matter could be decided on merits.

**2.3.** We have heard the rival submissions and perused the material before us. We find that the AO had applied the provisions of rule 8D for making disallowance u/s. 14 A of the Act. The honorable Bombay High Court has already held that rule 8D had no applicability for the year under consideration. The assessee had produced evidences to show that the loan taken by it was not used for investment purposes. As the loan was utilised for specific business purposes, (Pg.4 of the PB) therefore, there was no justification for upholding the interest disallowance. We find that during the year under consideration the assessee had sufficient own funds for making investment. Therefore, following the judgment of Reliance Utilities, (313 ITR 340), we hold that the FAA had wrongly upheld the disallowance under the head interest expenditure. We find that the assessee, on its own, had made disallowance of 1%. The Hon'ble Bombay High Court in the case of Godrej Agrovet had held that disallowance of 5% in the earlier years i.e. up to the AY. 2007-08 was reasonable. Respectfully following the above, we direct the AO to restrict the disallowance to 5% of the exempt income. While making the disallowance, he would give credit for the disallowance made by the assessee in its return of income. Ground number 1 is decided in favour of the assessee, in part.

**3.**Second ground of appeal is about applying the provisions of section 50 of the act for determination of full value of consideration in relation to sale of leasehold interest in plot at Jalgaon and Dombivali. During the assessment proceedings, the AO found that the assessee had claimed Long-Term Capital Loss (LTCL) of Rs. 1.71 crore on assignment of leasehold rights on leased land at Dombivali and Long-Term Capital Gain (LTCG) of Rs. 1.93 crores on assignment of leasehold rights on leased land at Jalgaon, that the assessee had claimed that provisions of section 50 were not applicable to the sale of leased land. He directed it to provide detailed working explanation of the claim made and to justify as to why the provisions of section 50 could not be applied on sale of leased land. After considering the submissions of the assessee dated 15/10/2008 and 23/10/2008 he held that the plots of land were allotted to the assessee by Maharashtra Industrial Development Corporation (MIDC), that it had right to enjoy the property, including the right of construction of immovable structure and right of transfer, that the leased right were in the nature of lease in perpetuity, that it had transferred the right by paying stamp duty at the rate of 5%, that the assessee had assigned all the rights, title, interest and possession to the buyer. Accordingly, he took the stamp valuation as deemed value of consideration for computing the income as per the provisions of section 50. He calculated the capital gain in respect of the above property and held that LTCG worked out to Rs. 1.66 crores and Rs. 2.28 crores respectively for the Dombivali and Jalgaon property respectively.

**3.1.**Before the FAA, the assessee argued that provisions of section 50 C were not applicable to leased lands. After considering the submission of the assessee and the assessment order, he held that the provisions of section 50 were applicable as the assessee had transferred the leasehold land at to localities, that the right in the leasehold land was a capital asset. Referring to the assignment date, the FAA further held that the assessee had not only transferred the right of leasehold but had transferred the specific area of plot of land, that the claim made by the assessee about non-transferring the land and building was factually incorrect, that leasehold right was nothing but a right over the land and building. Finally upheld the order of the AO. Besides he issued a notice u/s. 251 (2) of the Act for enhancing the valuation of land as per stamp duty i.e. Rs. 6.63 crores and Rs. 3.03 crores. Invoking the provisions of section 48, he held that above figures had to be considered as consideration value for working out capital gains. Accordingly the capital gain of Dombivali and Jalgaon properties was enhanced to Rs. 1,26,18,825/- and Rs. 42,95,630/- respectively.

3.2. During the course of hearing before us, the AR stated that provisions of section 50 were not applicable to leasehold land/building. He referred to the case of Greenfield Hotels and Estates (P.) Ltd. (389 ITR 68). The Departmental Representative (DR) left the matter to the discretion of the bench. We find that in the case of Greenfield Hotels (supra) the Department had caused the following question of law before the Hon'ble High Court:

*“whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in upholding the order of the CIT (A) in deleting the addition of Long-Term Capital Gain of Rs. 80, 58, 000/-on the ground that provisions of section 50 of the Act, 1961 were not applicable to transfer of land and building, being a leasehold property?”*

The Hon'ble High Court referring to the judgements of Credit Agricole Indosuez (377 ITR 102) and Satish P Shah(249 ITR 221)held that the question as claimed by the revenue did not give rise to any substantial question of law. We find that in the case of Ricoh India Ltd.(ITA/ 4464/ Mum/2012), identical issue has been dealt by the Tribunal as under:

*“9. Ground no.2, is regarding the applicability of section 50C, in respect of the sale of lease hold property.*

*10. The assessee has sold the factory which is on the lease hold plot for Rs. 1.40 crores and offered capital gain. The Assessing Officer adopted full value consideration as determined by the stamp duty authority at Rs.3,07,71,000. The Assessing Officer has also referred the valuation of the property to the DVO who has valued the property at ` 2,05,96,600. However, the Assessing Officer has considered the full sale consideration by adopting the stamp duty valuation for the purpose of working out the capital gain.*

*11. Before the learned CIT(A), the assessee challenged the action of the Assessing Officer and questioned the applicability of section 50C in case of lease hold rights. The learned CIT(A) has accepted the claim of the assessee and held that provisions of section 50C, is not applicable in assessee's case where the assessee has sold the lease hold rights. The learned CIT(A) has followed the decision of the Tribunal, Mumbai Bench, in Atul G. Puranik v/s ITO, ITA no.3051/Mum./2010, order dated 13th May 2011.*

*12. Before us, the learned Departmental Representative has submitted that there is no difference in the title of the property in question being the land, therefore, the provisions of section 50C, are applicable in the case of assessee. He relied on the order of the Assessing Officer.*

*13. The learned Counsel for the assessee, on the other hand, submitted that the lease hold rights cannot be equated with the ownership of the land and, therefore, the deemed provisions of section 50C, cannot be applied in case of transfer of lease hold rights. He has relied upon the following decisions:-*

*i) ITO v/s Pradeep Steel Re-rolling Mills Pvt. Ltd., [2013] 155 TTJ 294 (Mum.);*

*ii) Atul G. Pauranik v/s ITO, ITA no.3051/Mum./2010, order dated 13th May 2011; and*

*iii) Shri Hemant R. Tandel, ITA no.1934, 1835, 1935, 1836, 1941, 1837/Mum./2012, order dated 16th April 2015*

*14. We have considered the rival contentions as well as the relevant material on record. There is no dispute that what is transferred by the assessee is the lease hold property and, therefore, until and unless the property is converted into free hold the lessee holds only lease hold rights over the property. In the case of ITO v/s Pradeep Steel Re-rolling Mills Pvt. Ltd., the Tribunal, while dealing with an identical issue, has held as under:-*

"4. The revenue is in appeal. We are unable to find fault with the decision of the CIT(A) that section 54 cannot be invoked to a transfer of leasehold rights. The section applies only to capital assets being land or building or both. It does not in terms include leasehold rights in the land or building within its scope. The Assessing Officer's conclusion to the contrary is based on section 27(iiib) of the Act, which says that a person who acquires any rights, excluding any rights by way of a lease from month to month or for a period not exceeding one year, in or with respect to any building or part thereof, by virtue of any such transaction as is referred to in clause (f) of section 269UA, shall be deemed to be the owner of that building or part thereof. Firstly, this provision has been expressly limited in its application to sections 22 to 26 of the Act, which deal with the computation of the income under the head "Income from house property". It has not been made applicable to the computation of capital gains. Secondly, the rights mentioned in the provision are rights over the building and any rights over the land have not been included in the section. In any case, since the section 27(iiib) has not been extended to the computation of capital gains u/s. 45 and is limited to the computation of the income under the head "Income from house property", the conclusion of the CIT(A) that section 54 cannot be invoked where leasehold rights in land or building are transferred, seems to us, to be correct. We accordingly affirm the decision of the CIT(A) and dismiss the appeal filed by the revenue with no order as to costs."

*15. Similar view has been taken by the Tribunal in Atul (supra) as well as in the case of Shri Hemant R. Tandel (supra). Following the decision of the Tribunal cited supra, we do not find any error or illegality in the order of the learned CIT(A) qua this issue."*

Respectfully, following the above judgement of the honorable Bombay High Court and the order of the Tribunal, we decide the 2<sup>nd</sup> ground of appeal in favour of the assessee.

4. Last ground of appeal is about computation of Short-Term Capital Gain (STCG) of Rs. 40.77 lakhs derived from transfer of units of any equity oriented mutual fund. During the course of hearing before us it was stated that the AO had levied the tax on STCG at the rate of 30% (plus applicable surcharge) as against the rate of 10% (plus applicable surcharge). We find that the FAA has not passed any speaking order in that regard stating that issue raised by the assessee is not arising out of the assessment order. Calculation of taxes is made in the tax demand notice and if the AO does not apply correct rate of taxes, it is duty of the FAA to decide the issue. Therefore, we direct him to adjudicate the issue, raised before him, by passing any speaking order i.e. to decide the rate of taxes applicable to STCG for the year under consideration. Third ground of appeal is allowed in favour of the assessee, in part.

A result, appeal filed by the assessee stands partly allowed.

फलतः निर्धारिती द्वारा दाखिल की गई अपील अंशतः मंजूर की जाती है.

Order pronounced in the open court on 15<sup>th</sup> March, 2017.  
आदेश की घोषणा खुले न्यायालय में दिनांक 15 मार्च, 2017 को की गई।

Sd/-

Sd/-

(सी .एन .प्रसाद / C.N.Prasad )

(राजेन्द्र / Rajendra)

न्यायिक सदस्य / JUDICIAL MEMBER

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक/Dated : 15.03.2017.

Jv.Sr.PS.

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1.Appellant /अपीलार्थी

2. Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त

5.DR "A " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अ.न्याया.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**

उप/सहायक पंजीकार **Dy./Asst. Registrar**

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.