

आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ , मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

BEFORE SHRI C.N. PRASAD, JUDICIAL MEMBER AND

SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

आयकर अपील सं/ I.TA No.2729/Mum/2011

(निर्धारण वर्ष / Assessment Year:2007-08

M/s. S.S. Buildcon Pvt. Ltd., 315, Parekh Market, 39, J.S.S. Road, Opera House, Mumbai	बनाम/ Vs.	The DCIT, Central Circle-37, Aayakar Bhavan, Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAICS 165G		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
अपीलार्थी ओर से/ Appellant by:		Shri V.C. Shah
प्रत्यर्थी की ओर से/ Respondent by:		Shri R.A. Dhyani

सुनवाई की तारीख / **Date of Hearing** :02.02.2016

घोषणा की तारीख /**Date of Pronouncement** :10.02.2016

आदेश / O R D E R

PER C.N. PRASAD, JM:

This appeal is filed by the assessee against the order of the Ld. CIT(A)-41, Mumbai dated 20.01.2011 pertaining to assessment year 2007-08.

2. The first issue in the appeal of the assessee is that the Ld. CIT(A) erred in sustaining the disallowance of Rs. 3,83,270/- made by the AO u/s. 14A of the Act.

2.1. The Assessing Officer while completing the assessment disallowed Rs. 3,94,345/- u/s. 14A of the Act being 0.5% of average investment value. However, the disallowance was restricted to Rs. 3,83,269/- since the assessee has claimed expenses only to the extent of Rs. 3,83,269/-.

3. On appeal, the Ld. CIT(A) sustained the disallowance holding that the AO adopted reasonable basis for making disallowance.

4. The Ld. Counsel for the assessee referring to page-8 of the compilation submits that out of total expenses debited to profit and loss account i.e. Rs. 3,79,844/- under administrative expenses, service tax, security transaction tax and share stamp duty amounting to Rs. 2,68,625/- has been added back by the assessee itself and not claimed as expenses in statement of total income. He further submits that loss of Rs. 1,05,340/- is debited to administrative expenses is on account of loss on F & O trading and this is not an expense debited to P&L account. Therefore, he submits that the assessee claimed expenses as deduction in computing profit from the business was only Rs.9,304/- and at best the expenses attributable for earning dividend income which can be disallowable should be restricted to Rs. 9,304/-.

5. The Ld. Departmental Representative placed reliance on the orders of the lower authorities.

6. On hearing both sides, we find considerable force in the submissions of the Ld. Counsel for the assessee. For this assessment year Rule 8D of the I.T. Rules are not applicable and therefore only the reasonable expenses attributable for earning exempt income has to be disallowed. We find from Schedule-I of the Profit & Loss account which is the administrative expenses, the total expenses was debited were Rs. 3,79,844/-. In the computation of income the assessee added back Service tax of Rs. 91,492, Security Transaction charges of Rs. 1,42,413/- and Share Stamp Duty of Rs. 34,720/-. Apart from that an amount of Rs. 1,05,339/- which was debited under Administrative expenses relates to loss on F&O trading. Therefore, as rightly submitted by the Ld. AR, all these items should be excluded and if it is excluded, what was debited by the assessee towards business expenses could be only Rs. 9,304/- towards Audit fee, Demat charges, Bank charges, Legal expenses, ROC filing fees and preliminary expenses. Therefore, the disallowance at best should be restricted to Rs. 9,304/-. However, it cannot be said that this entire expenses can be said to be incurred for earning exempt income. In the circumstances, we direct the AO to restrict the disallowance u/s. 14A of the Act to 5% of the dividend income earned by the assessee.

7. The last issue in the appeal of the assessee is that the Ld. CIT(A) erred in confirming the sum of Rs, 13,07,762/- as income from business and not as short term capital gain.

7.1. Brief facts are that the assessee reported short term capital gain of Rs. 13,07,762/- and this was claimed set off from the net

profit in the computation of income and claimed rebate u/s. 88E of the Act. However, the Assessing Officer treated the short term capital gain as business income on the ground that the assessee is into share trading business.

8. On appeal, the Ld. CIT(A) sustained the action of the AO in treating share transactions as business income in place of short term capital gain by dismissing the appeal of the assessee.

9. The Ld. Counsel for the assessee referring to page-7 of the Paper Book which is the profit and loss account submits that assessee is in the business of share trading and also investments. Referring to Schedule-H of the Balance sheet submits that the income consists of short term capital gain and profit on share trading. He further submits that even the audited accounts shows that the assessee is having investments and also shares trading business separately. He submits that the assessee is maintaining two portfolios i.e. one for investments and the other for share trading therefore there is no justification in treating the short term capital gain as income from business. In alternative, the Ld. Counsel submits that deduction u/s. 88E should be allowed to the extent of Rs. 1,89,843/- in the event of assessing short term capital gain as business income.

10. The Ld. DR placed reliance on the order of the lower authorities.

11. Heard both sides, perused the orders of the lower authorities and the submissions made before us. On perusal of the assessment order, we find that the AO has not discussed anything as to why he is

treating the short term capital gain as business income. There is not even a whisper about his action in treating the short term capital gain as business income. The Ld. CIT(A) observed that the assessee never shown the investments in the balance sheet which is again a contrary to the facts appearing in the balance sheet which clearly shows that there were investments to the extent of Rs. 15,67,38,053/- and it is the contention of the assessee that it is maintaining two portfolios one towards investments and one towards trading, the income from investments shown as under capital gains and income from trading activity shown as business income. In our considered view, since the AO has not examined the issue in proper perspective as was done by the Ld. CIT(A) also, we considered it proper to remit the issue to the file of the AO for fresh adjudication in accordance with law after providing adequate opportunity to the assessee. Thus, we restore this issue to the file of the AO.

12. In the result, the appeal filed by the assessee is partly allowed for statistical purpose.

Order pronounced in the open court on 10th February, 2016.

Sd/-

(RAJESH KUMAR)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 10th February, 2016

व.नि.स./ Rj , Sr. PS

Sd/-

(C.N. PRASAD)

न्यायिक सदस्य/JUDICIAL MEMBER

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण,
मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार

(Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai