

**IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH, MUMBAI**

**[BEFORE S/SHRI B. R. BASKARAN, ACCOUNTANT MEMBER**

**AND AMARJIT SINGH, JUDICIAL MEMBER]**

आयकर अपील सं/ I.T.A. No.7491/Mum/2013

(निर्धारण वर्ष / Assessment Year: 2009-10

Raptakos, Bret & Co. Ltd., 21A, Mittal Tower, Nariman Point, Mumbai 400 021	<b>बनाम/</b> Vs.	The Deputy Commissioner of Income Tax – 5(3), 5 <sup>th</sup> Floor, Aayakar Bhavan, M. K. Road, New Marine Lines, Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : <b>AAACR1772R</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से/ Appellant by:	S/Shri Ronak Doshi Bhakti Vaidya
प्रत्यर्थी की ओर से/Respondent by:	Shri Kailash P. Gaikwad, Sr. AR

सुनवाई की तारीख / Date of Hearing: 02.09.2015

घोषणा की तारीख /Date of Pronouncement: 04.11.2015

**आदेश / O R D E R**

**PER AMARJIT SINGH, JM:** This appeal preferred by the assessee is directed against the order of the learned Commissioner of Income Tax (Appeals)-9, Mumbai [hereinafter referred to as the learned “CIT(A)"] dated 24-20-2013 passed in appeal No.CIT(A)-9/DCIT-5(3)/53/2012-13 u/s 271 (1) (c) of the Income Tax Act, 1961 [hereinafter referred to as the ‘Act’] raising the following sole effective ground.

- “1. On the facts and in circumstances of the case and in law the CIT(A) erred in upholding the action of the AO to levy penalty of Rs.8,66,165 under section 271(1) (c) of the Act on the alleged ground that the Appellant has furnished inaccurate particulars of income.”

2. The assessee is a Company engaged in the business of manufacturing and sale / trading of pharmaceutical formulations, dietetic specialities and animal husbandry. The assessee filed its return of income for the assessment year 2009-10 on 06-10-2009 disclosing total income of Rs.38,09,80,856/-. The Assessing Officer [hereinafter referred to as the 'AO'] completed the assessment u/s 143(3) of the Act determining total income at Rs.38,35,29,150/- on 28-06-2012. During the scrutiny the AO noticed that the assessee has earned dividend income and it has disallowed a sum of Rs.52,39,420/- u/s 14A and expenses relating to the exempt income of dividends, but the said disallowance was not in accordance with Rule 8D. The assessee contended before the AO that the assessee company derived interest income on loans given by it and capital gains on investments made and the expenses incurred are attributable to earning of both taxable income and exempt income; so the proportionate expenses relating to exempt income were suo moto disallowed. The AO did not accept the working of the assessee and worked out the disallowance u/s 14 read with Rule 8D at Rs.77,87,712/-. As the assessee itself already disallowed Rs.52,39,420/-, therefore, the AO added a sum of Rs.25,48,292/- to the total income of the assessee and initiated penalty proceedings u/s 271(1)(c) of the Act on the said disallowance. The assessee accepted the order of assessing officer. During the penalty proceedings, the AO arrived at the conclusion that the assessee failed to compute the disallowance under Rule 8D and it amounted to furnishing of inaccurate particulars of income. On this basis, the AO levied penalty of Rs.8,66,165/- u/s 271(1) (c) of the Act. The assessee carried the matter in appeal before the learned CIT(A). The learned CIT(A) confirmed the order of the AO. Being aggrieved, the assessee is now in appeal before us.

3. We have heard the rival contentions and perused the materials on record. The learned AR for the assessee argued that the assessee had itself made suo moto disallowance of Rs.52,39,420/- in its computation of income and the

assessee adopted gross current assets in the balance sheet, while disallowing the interest expenditure under Rule 8 (2) (ii) to the tune of Rs.19,22,294/-; whereas the AO disallowed the interest expenditure to the tune of Rs.21,28,190/-. The ld. AR submitted that the assessee's view is supported by the order of the ITAT, Mumbai Benches in the case of Shitanshu Bipin Vora Vs. ACIT passed in ITA No.2585/Mum/2013. It is also argued that while disallowing the indirect expenses under Rule 8D (iii), the assessee applied 0.5% of the average investment or actual dividend received whichever is lower. Thus, the assessee had followed the ratio that if no dividend is actually received, no disallowance was computed under Rule 8D (iii) and when the dividend is received, expenses deemed to be incurred for earning such income cannot exceed the exempt income itself. In this regard, the assessee contended that it suo moto made disallowance u/s 14A of the Act as per certificate of the tax auditors given in the audit report and this cannot be treated as furnishing of inaccurate particulars of income attracting penalty u/s 271(1) (c) of the Act and hence, the penalty order in question is not sustainable in the eyes of law. The learned AR for the assessee also placed reliance on the decision of the Hon'ble Apex Court in the case of CIT Vs Reliance Petroproducts (P) Ltd. [322 ITR 158 (SC)]. It is also further argued that in the instant case, two possible views can be taken. Therefore, in the facts and circumstances of the present case, no penalty is leviable in view of the law settled in the case of (i) CIT Vs G. D. Naidu and others [165 ITR 63 (Mad)] and (ii) CIT Vs Sivananda Steels (256 ITR 683 (Mad)] and submitted that the order of the learned CIT(A) be set aside.

4. On the other hand, the Departmental Representative [hereinafter referred to as "the DR"] has refuted the said contentions of the learned AR and submitted that the assessee has submitted inaccurate particulars of income to avoid payment of tax and hence, the order of the learned CIT(A) is quite legal and requires no interference.

5. Keeping in view the arguments advanced by both the parties and on careful perusal of the materials on record, it has come to our notice that while disallowing the interest expenses incurred in relation to the exempt income, the assessee adopted the gross current assets in the balance sheet whereas, the AO had taken the net assets (current assets less current liabilities) and on account of assessing the indirect expenses, the assessee had applied 0.5% of average investment or actual dividend received whichever was lower. Thus, the assessee had followed the ratio that if no dividend is actually received, no disallowance is to be made and when dividend is received, expenses deemed to be incurred for earning such income cannot exceed the exempt income itself. The view taken by the assessee is supported by certain legal decisions. The assessee itself disallowed an amount of Rs.52,39,420/- in its computation of income as per tax audit report. Without going into so much of technicality, if, it is assumed that the claim of the assessee is wrong, then, no doubt, the claim of the assessee is not to be considered as a case of furnishing of inaccurate particulars or concealment of income. The decision relied upon by the assessee in the case of CIT Vs Reliance Petrochemicals (P) Ltd. (supra) is applicable in the present case.

6. Moreover, the same issue has been decided by the ITAT, Mumbai "E" Bench vide order dated 20-03-2015 passed in ITA No.6253/Mum/2013 for the AY 2009-10 by observing in Para 7 and 8 as under:

*" 7. The disallowance u/s 14A is by way of fiction but such fiction is not for levy of penalty also. For levy of penalty the AO must show that there was furnishing of inaccurate particulars of income or that the explanation furnished by the assessee was not bonafide one. The findings given in the assessment proceedings cannot operate as res-judicata, because the considerations that arise in the penalty proceedings are different from those in the assessment proceedings. The AO has brought nothing on record to suggest that the explanation of the assessee was false or devoid of bonafide. As per Explanation 1 to Sec. 271(1) (c), if the AO finds that the explanation offered by the assessee is false, then the penalty can be levied on the amount which is found to be concealed. Therefore, the whole idea behind Explanation 1 is that the AO has to first record reasons for arriving at a conclusion that there is concealment on the part of the assessee. After seeking an explanation if the authority*

*comes to a conclusion that it is false, then the AO can proceed to levy penalty. The findings given in the assessment proceeding cannot operate as res-judicata, because the consideration that arise in the penalty proceedings are different from those in the assessment proceeding.*

8. *In the case of Reliance Petroproducts (supra), Hon'ble Supreme Court has deleted the penalty, which was imposed on account of disallowance of interest paid on loans taken for purchase of shares. Accordingly, we do not find any infirmity in the order of CIT(A) for deleting the penalty levied with reference to disallowance of expenses u/s 14A of the Act."*

7. In view of the above discussions, we are unable to agree with the order of the learned CIT(A) confirming the penalty levied by the AO u/s 271 (1) (c) of the Act. Accordingly, we set aside the order of Ld.CIT(A) and direct the AO to delete the impugned penalty.

8. In the result, the appeal of the assessee is hereby allowed.

Order pronounced in the open court at the time of hearing on 4<sup>th</sup> November, 2015

Sd/-

(B. R. BASKARAN)

लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-

(AMARJIT SINGH)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 4<sup>th</sup> November, 2015

व.नि.स./ *LK Deka, Sr. PS*

**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**