

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

BEFORE SHRI G.S.PANNU, ACCOUNTANT MEMBER
AND SHRI JOGINDER SINGH, JUDICIAL MEMBER

ITA No. 5767/MUM/2012
(Assessment Year : 2009-10)

Ashish Estates & Properties Pvt. Ltd.
115, Maker Chambers – III,
Nariman Point, Mumbai 400 021
PAN:AAACA4555D ... Appellant

Vs.

The DCIT 3(1),
Aaykar Bhavan, Ground Floor,
M.K.Road, Mumbai. Respondent

ITA No. 5992/MUM/2012
(Assessment Year : 2009-10)

The DCIT-3(1),
Mumbai. Appellant

Vs.

Ashish Estates & Properties Pvt. Ltd.
115, Maker Chambers – III,
Nariman Point, Mumbai 400 021
PAN:AAACA4555DRespondent

Assessee by : Shri Jitendra Jain
Respondent by : Shri G.N.Makwana

Date of hearing : 04/02/2016
Date of pronouncement : 16/03/2016

ORDER**PER G.S. PANNU,AM:**

The captioned cross-appeals filed by the assessee and Revenue pertaining to A.Y. 2009-10 are directed against an order passed by Ld. CIT(A)-5, Mumbai dated 17/07/2012, which in turn arises out of an order passed by AO under section 143(3) of the Income Tax Act, 1961 (the Act) dated 07/12/2011. Grounds of appeals raised by the assessee as well as Revenue read as under:-

Grounds of Assessee's Appeal:-

- 1) *The Commissioner of Income Tax (Appeals)-5 Mumbai [hereinafter referred to as CIT(A)] erred in invoking the provisions of section 14A r.w.r.8D to the facts and circumstances of the Appellants case and confirming the disallowance of Rs.58,10,586/- The CIT (A) has not appreciated the fact that the AO has failed to discharge the onus cast on him under sub section (2) of section 14A before invoking the provisions of Rule 8D.*

Without prejudice to above, the AO has erred in considering the amounts invested in the AOP and with the Partnership Firm as investment, income which does not form part of total income in computing the disallowance under clause (ii) to Sub Rule (2) of Rule 8D.

Without prejudice to above, the CIT (A) erred in not appreciating the fact the income earned from AOP is taxable under section 115JB and therefore should not be considered in computing the disallowance under section 14A r.w.s Rule 8D.

Grounds of Revenue's Appeal:-

1. *"Whether on the facts and circumstances of the case and in law, the Ld.CIT (A) was justified in deleting the addition of Rs.62,27,800/- made on account of interest expenses, without appreciating the fact that the investments reflected in the balance sheet give rise to either capital gain or exempt income".*

2. *"Whether on the facts and circumstances of the case and in law, the Ld.CIT (A) was justified in holding that interest paid on any fund used for investment cannot be an allowable deduction under the head 'Business Income'."*

3. *"Whether on the facts and circumstances of the case and in law, the Ld.CIT (A) was justified in holding that interest attributable to utilization towards loans/ advances given to AOP /Firm, is allowable deduction, notwithstanding the findings of the AO that income of AOPs & Firms are offered for tax and same is exempt from tax in the hands of the assessee company"*.

4. *"Whether on the facts and in circumstances of the case and in law, the Ld.CIT (A) was justified in holding that in the computation filed before the Ld.CIT(A) and which forms a part of the appellate order as Annexure-A, the balance with the Panchvati Associates (Rs.5,42,33,157/ - as on 31.03.2009 and Rs.2,72,40,596/ - a on 31.03.2008 both figures being negative balance) and Conwood Ashish (Rs.1,35,50,158/ - as on 31.03.2009 being negative balance and Rs.5,52,62,521/ - as on 31.03.2008) have been allowed to be reduced from the amount of investments which is not in accordance with section 14 of the Act as such negative balances do not give rise to any exempt income and consequently the disallowance u/s.1-:1:A deserved to be enhanced"*.

5. *"The appellant prays that the order of the CIT(A) on the above ground be set aside and that of the Assessing Officer be restored"*.

2. At the time of hearing, it was a common point between the parties that the issues raised in the respective appeals are similar to the issues which came up before the Tribunal in assessee's own case for the earlier assessment year of 2008-09 vide ITA Nos. 3769, 4006/Mum/2012 dated 23/06/2015. The Tribunal has decided the issues raised in the Revenue's appeal in relation to the disallowance under section 36(1)(iii) of the Act in favour of the assessee and the issues raised in the assessee's appeal relating to disallowance under section 14A of the Act has been partly allowed.

3. In this background, the brief facts relevant for the year under consideration are as follows. The assessee is a company incorporated under the provisions of the Companies Act, 1956 and is, inter-alia,

engaged in the business of developing/construction of buildings and properties. The return of income filed by the assessee for the year under consideration declaring a loss of Rs.1,84,96,412/- was subject to scrutiny assessment, wherein the loss was assessed at Rs.1,22,68,612/-. The loss was reduced by a sum of Rs.62,27,800/- on the ground that interest expenditure to the above extent was incurred on loans which were not used for the purpose of business of the assessee. Such disallowance was worked out by invoking the provisions of section 36(1)(iii) of the Act. Simultaneously, the Assessing Officer also noted that certain interest bearing funds were utilized for making investments, which give rise to exempt income and, therefore, part of interest expenses relatable to such investment was also disallowable under section 14A of the Act. However, the Assessing Officer made no disallowance under section 14A of the Act, for the reason that interest expenditure was already disallowed under section 36(1)(iii) of the Act. The Assessing Officer further noted that in case, assessee got a relief in respect of the disallowance under section 36(1)(iii) of the Act during the appellate proceedings and/or the disallowance sustained under section 36(1)(iii) becomes lesser than the amount disallowable under section 14A r.w. Rule 8D of the Income Tax Rules, 1962 (in short 'the Rules'), then the assessee would suffer disallowance under section 14A of the Act computed in terms of Rule 8D of the Rules.

4. It was a common point between the parties that the aforesaid approach of the Assessing Officer is identical to that in assessment year 2008-09 (supra). In this background, assessee carried the matter before CIT(Appeals), who following his order for preceding assessment year

2008-09, deleted the disallowance worked out by the Assessing Officer under section 36(1)(iii) of the Act. Accordingly, he deleted the addition of Rs.62,27,800/- made by the Assessing Officer, against which Revenue is in appeal before us as per the above stated Grounds of appeal. Simultaneously, the CIT(Appeals) partly agreed with the Assessing Officer on the issue of application of section 14A of the Act and sustained a disallowance of Rs.58,10,586/- under section 14A of the Act computed as per Rule 8D of the Rules. Against such action of the CIT(Appeals), the assessee is in further appeal before us.

5. In this back ground, it was a common point between the parties before us that similar position prevailed before the Tribunal in assessment year 2008-09 also. So, however, the Ld. Representative for the assessee pointed out that with regard to the disallowance sustained in the earlier assessment year of 2008-09 under section 14A of the Act, one of the points raised by the assessee was that the entire investment subjected to the disallowance under section 14A r.w.r 8D of the Rules was in the nature of strategic investment on which no disallowance under section 14A of the Act was called for. The Ld. Representative for the assessee vehemently pointedly that though the Tribunal in para 6 of its order dated 23/06/2015(supra) has noted such argument, but there is no specific finding on this aspect. In this context, we have carefully perused the order of the Tribunal dated 23/06/2015(supra) and find that while evaluating the working of disallowance under section 14A of the Act in the manner prescribed u/r.8D of the Rules, the Tribunal directed partial relief, in as much as, it was directed that while calculating the amount of investment from which exempt income is

earned, the investment made in the AOP – Poddar Ashish Developers is liable to be excluded. The arguments relating to the strategic investments in relation to the disallowance under section 14A of the Act has also been noted by the Tribunal in para 6 of the order. So, however, we are unable to acquiesce with the plea of the Ld. Representative for the assessee that the said plea has not been decided specifically and therefore, it is open for the succeeding Bench i.e. the instant Bench, to take a view on the matter. In our considered opinion, after noting respective pleas on the disallowance under section 14A r.w. Rule 8D of the Rules, the Tribunal has made an elaborate discussion and the plea regarding strategic investment is deemed to have been rejected in the absence of any relief on that count. It has to be understood as having been over-ruled in sub-silentio. Therefore, it would only be appropriate for us to decide the matter in line with the precedent in assessee's own case for the sake of consistency. Thus, we direct the Assessing Officer to rework the disallowance under section 14A r.w. Rule 8D of the Rules in the light of the decision of the Tribunal in the case of the assessee dated 23/06/2015(supra) for the sake of consistency, especially when no change in facts and circumstances have been brought out by either side.

6. As a consequence, therefore, we dismiss the appeal of the Revenue as similar issue has been decided in the assessee's own case for earlier year by the Tribunal in favour of the assessee. In so far as assessee's appeal is concerned, the same is also liable to be decided in terms of the directions of the Tribunal in assessee's own case and for that matter the Assessing Officer is directed to rework the disallowance

under section 14A of the Act r.w. Rule 8D of the Rules following the said precedent.

7. In the result, whereas the appeal of the Revenue is dismissed, that of the assessee is partly allowed for statistical purposes following the precedent in assessee's own case for assessment year 2008-09(supra).

Order pronounced in the open court on 16th March, 2016.

Sd/-
(JOGINDER SINGH)
JUDICIAL MEMBER
Mumbai, Dated 16/03/2016

Sd/-
(G.S. PANNU)
ACCOUNTANT MEMBER

Vm, Sr. PS

Copy of the Order forwarded to :

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai