

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, G, मुंबई ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "G", MUMBAI**

**श्री अमित शुक्ला, न्यायिक सदस्य एवं
श्री अश्वनी तनेजा, लेखा सदस्य, के समक्ष**

**Before Shri Amit Shukla, Judicial Member, and
Shri Ashwani Taneja, Accountant Member**

**ITA No.818/Mum/2015
Assessment Year: 2007-08**

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| Galaxy Chemicals, C-49 TTC Indl Area Pawne, Navi Mumbai-400703 (Appellant) | बनाम/ Vs. | ACIT Range 22 (3) Vashi Railway St. Bldg. Navi Mumbai-40020 (Respondent) |
| P.A. No.AAAFG0860G | | |

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| Appellant by | Shri C.P. Ramaswami(AR) |
| Revenue by | Shri Prakash Mane (DR) |
| सुनवाई की तारीख/ Date of Hearing: | 03/11/2016 |
| आदेश की तारीख / Date of Order: | 03 /11/2016 |

आदेश / O R D E R

Per Ashwani Taneja (Accountant Member):

This appeal has been filed by the Assessee against order of Ld. Commissioner of Income Tax(Appeals), Mumbai-26 (in short 'CIT(A)'), dated 21.11.2014 passed against assessment order u/s 143(3) r.w. section 148 of the Act, dated 07.03.2013 for Assessment Year 2007-08 on the following Grounds:

"1.On reopening the assessment without any fresh material:

(a) The learned Commissioner of Income Tax (Appeals)-26.

Mumbai grossly erred in upholding the assumption of jurisdiction by the Assessing Officer u/s.147 despite the fact that there was no fresh tangible material with the Assessing Officer and the notice u/s. 148 was issued on a mere change of opinion based on an audit objection. He ought to have annulled the impugned reassessment.

b) The learned CIT(Appeals) failed to appreciate that in the original scrutiny assessment disallowance u/s.14A was made after full detailed enquiry and consequently erred in upholding the reopening on the ground that the Assessing Officer was not apprised of primary facts. He ought to have held that the reopening was void ab initio and annulled the impugned reassessment.

c) The learned CIT(Appeals) failed to appreciate that audit objection, without any fresh tangible material, cannot be the basis for reopening an assessment, when there was no failure on the part of the appellant to disclose fully and truly all material facts. Consequently, he erred in upholding the reopening in gross negligence of the decisions rendered by the Hon'ble Apex Court and the Hon'ble Bombay High Court and the Hon'ble Benches of ITAT Mumbai in this regard.

2. On merits of (disallowance u/s.14A- without prejudice to around No.1:

(a) The Learned CIT(Appeals) erred in upholding disallowance u/s 14A of a sum of Rs.47,00,116/- despite the fact that no original investment representing the cost of shares was lying to the credit of the partners in their capital accounts (the cost of shares having already been withdrawn in the earlier years) and consequently erred in assuming figures uncorroborated b) the statements of accounts.

(b) The CIT(Appeals) failed to appreciate that no interest was payable directly or indirectly on the investment cost of shares and consequently erred in upholding disallowance of Rs.47.00,1 16/- u/s.14A read with Rule 8D on assumed figures divorced from facts. He ought to have deleted the addition made by the Assessing Officer.

3.. The learned CIT(Appeals) grossly erred ill not following binding decisions of jurisdictional High Court and Jurisdictional Benches of Hon'ble ITAT on the issue of disallowance u/s.14A with identical facts.”

2. During the course of hearing, arguments were made by Shri C.P. Ramaswami, Authorised Representatives (AR) on behalf of the Assessee and by Shri Prakash Mane, Departmental Representative (DR) on behalf of the Revenue.

3. During the course of hearing the primary objection raised by the assessee was regarding challenging the validity of the reopening of the case and therefore we find it appropriate to decide the ground of reopening first of all.

4. It has been argued that the reopening of the case is invalid in as much as, the Reasons recorded are based upon change of opinion and not permitted under the law and therefore, assumption of jurisdiction was bad in law and therefore impugned reassessment order should be quashed.

5. Per contra, Ld. DR relied upon the order of the lower authority.

6. With the assistance of the parties, it is noted that following Reasons dated 30.03.2012 were recorded by the AO.

“1. the return of income as filed on 27.07.2007 declaring total income at Rs.1,60,10,110/-. Assessment order u/s 143(3) was passed on 22.12.2009 at total income of Rs.9,77,500/-.

2. On verification of records of A.Y. 2007-08, it is seen that the assessee has earned tax exempt income of Rs.55,64,779/- and no corresponding expense is disallowed u/s 14A r.w. Rule 8D of the Income Tax Act, 1961. Considering the interest paid to partners amounting to Rs.68,76,229/-, the disallowance u/rule 8D(2)(iii) works out to Rs.46,21,939/-

3. Therefore, I have reason to believe that the income of Rs.46,41,939/- has escaped assessment within the meaning of section 147 of the Income Tax Act, 1961. Notice u/s 148 of the Income Tax Act, 1961 is issued.”

6.1. On the basis of the perusal of the aforesaid Reasons, it is clear that the original assessment order was made u/s 143(3) on 27.12.2009. We perused the aforesaid assessment order and found that assessment was made on total income of Rs.1,63,76,220/-. But, the Assessing Officer while recording the Reasons has mentioned that income was assessed at Rs.9,77,500/-. Thus, there is apparently a factual mistake in the Reasons.

6.2. In addition to that, it is noted that reasons have been recorded on the ground that on verification of assessment records, it was noted by the AO that assessee had earned exempt income but no corresponding expenses were disallowed u/s 14A r.w. Rule 8D of Income Tax Act 1961. We find that this allegation in the Reasons is incorrect on the face of it. It is noted that on second page of the assessment order dated 22.12.2009, at its para 5, detailed discussion has been made by the AO with regard to expenses disallowable being attributable to income claimed exempt u/s 14A. The Relevant part of the original assessment order is reproduced hereunder for the sake of ready reference:

“5. Expenses Attributable to income claimed exempt uis.14A: It is seen from the computation of total income, the assessee has claimed exempt income being Dividend income of Rs.55,64,779/- which was shown in the Profit & Loss Account and some expenses were also debited to the Profit & Loss Account. Subsequently entire dividend income of Rs.55.64.7791- was claimed exempt u/s 10(34) of the Act. However, as

per the insertion of new Rule i.e. Rule 8D as per the notification no.45/2008 dated 24.03.2008 which reads as under:

8D(1) Where the Assessing Officer, having regard to the accounts of the assessee of a previous year, is not satisfied with-

(a) The correctness of the claim of expenditure made by the assessee; or (b) The claim made by the assessee that no expenditure has been incurred, in relation to income which does not form part of the total income under the Act for such previous year, he shall determine the amount of expenditure in relation to such income in accordance with the provisions of sub-rule (2).

Since the assessee has shown huge dividend income which was credited to Profit & Loss Account, it cannot be said that the assessee had not incurred any expenditure in connection with Dividend income. The assessee has debited various expenses to the tune of Rs.8,23,971/- to the Profit & Loss Account, against the Income which forms part of total income as well as not forming total income. Therefore, the provisions of section 14A r.w.r. 8D are very much applicable in the assessee's case. Further, it is not possible to earn any exempt income without incurring some administrative expenses. Therefore, as per Rule 8D the expenses attributable to earn dividend income is calculated as under:

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| 1. Amount of expenses directly related to such income | Rs. Nil |
| 2. Amount of the interest expenses indirectly attributable to such income | Rs. Nil |
| 3. 0.5% of Average value of such investment on the first And last day of previous year $(49418400+50259150)/2$ | |
| $(0.5\% \times 49838775/-)$ | Rs.2,49,194/- |
| Total Disallowance as per Rule 8D | Rs.2,49,194/- |

As per the Rule 8D the disallowance of expenditure is worked out at Rs.2,49,194/-. Therefore, the disallowance u/s 14A r.w.r.8D is made to the extent of Rs.2,49,194/- and added to the total income accordingly.

6.3. Thus, from the above it is clear that Ld. AO had grossly erred in the recording the Reasons and invoking the provisions of section 147 of the Act.

6.4. It is further noted by us that it has been mentioned by the AO in the Reasons that the expenses had been allowed u/s 14A r.w. Rule 8D. It is noted that impugned assessment year is 2007-08, whereas Rule 8D was inserted vide IT (fifth Amendment) Rules, 2008 w.e.f. 24.03.2008. Thus, Rule 8D is clearly not applicable in the assessment year before us. Thus, the impugned Reasons are not only factually incorrect but apparently incorrect on law as well. Further, the reopening has been done in a highly casual manner and without making any application of mind. It is a classic example of misuse of provisions of reopening. Constitution of our country has attached great sanctity of the finality of litigation. It has been held by the **Hon'ble Supreme Court** in the case of **CIT v. Kelvinator of India Ltd. 320 ITR 561(SC)** that reopening cannot be done in absence of any tangible material and merely on the basis of change of opinion of the AO. Further, Hon'ble **Delhi High Court** in the case of **CIT v. Samcor Glass Ltd.** vide its judgment dated 12th October 2015 in ITA No.768/2015 (reported at 94 CCH 0075), came down heavily upon income tax department for reopening of the assessment in mechanical and casual manner which resulted in unnecessary harassment of the assessee. The relevant portion of the judgment is reproduced hereunder:

“7. The Court is of the view that notwithstanding several decisions of the Supreme Court as well as this Court clearly enunciating the legal position under Section 147/148 of the Act, the reopening of assessment in cases like the one on hand give the impression that reopening of assessment is being done mechanically and casually resulting in unnecessary harassment of the Assessee.

8. The Court would have been inclined to impose heavy costs on the Revenue for filing such frivolous appeals but declines to do so since the appeals are being dismissed ex parte. However, the Court directs the Revenue through the Principal Chief Commissioner of Income Tax (Pr CIT) to issue instructions to the AOs to strictly adhere to the law explained in various decisions of the Supreme Court and the High Court in regard to Sections 147/148 of the Act and make it mandatory for them to ensure that an order for reopening of an assessment clearly records the compliance with each of the legal requirements. Secondly, the AOs must be directed to strictly comply with the law explained by the Supreme Court in GKN Driveshafts (India) Ltd v. Income Tax Officer (2003) 259 ITR 19 (SC) as regards the disposal of the objections raised by the Assessee to the reopening of the assessment.”

6.5. We find that in the case before us also the reopening has been done in a highly casual and mechanical manner disregarding the provisions of law, as discussed above in detail. Thus, we have no other option but to hold that Reasons recorded by the AO are factually incorrect and also invalid in the eyes of law and thus assumption of jurisdiction by the AO was bad in law and consequently, the impugned reassessment order is nullity in the eyes of law and the same is hereby quashed.

7. In the result, the appeal filed by the assessee may be treated as allowed for statistical purposes.

Order was pronounced in the open court at the conclusion of the hearing.

Sd/-
(Amit Shukla)

Sd/-
(Ashwani Taneja)

न्यायिक सदस्य / JUDICIAL MEMBER लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 10/11/2016

Patel, P.S./नि.स.

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
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