

IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH, MUMBAI
BEFORE SHRI R.C. SHARMA, AM AND SHRI SANDEEP GOSAIN, JM

आयकर अपील सं./ I.T.A. No. 1473/Mum/2012
(निर्धारण वर्ष / Assessment Year: 2008-09)

M/s. ARJ Shares & Stock Brokers Pvt. Ltd. 21, Khatau Building, 40/48, Bank Street, Fort, Mumbai-400 001.	बनाम/ Vs.	DCIT, Range-4(3), Room No. 649, 6 th Floor, Aayakar Bhavan, M.K. Road, Mumbai.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No.		AAACJ 7576 M
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Anuj Kisnadwala
प्रत्यर्थी की ओर से/Respondent by	:	Shri Manoj Kumar

सुनवाई की तारीख / Date of Hearing	:	29/12/2015
घोषणा की तारीख / Date of Pronouncement	:	24/12/16

आदेश / ORDER

Per Sandeep Gosain, J. M.:

The Present Appeal filed by the assessee against the order of the CIT(A)-8 dated 18.01.2012 thereby partly allowing the appeal of the assessee filed against the order of the AO u/s 143(3) of the I.T. Act, 1961, dated 14.12.2010 on the grounds mentioned below.

1. *“Comm. of Income Tax (A) erred in law and fact in confirming the calculation of long term Capital Gain on sale of shares of BSE Ltd as made by assessing officer & ignoring calculation made by appellant.*
2. *Comm. of Income Tax (A) erred in law and fact in ignoring the provisions of Section 55(2)(ab) of the Act, wherein the manner in which cost of Shares sold is enacted.*
3. *Comm. of Income Tax (A) erred in law and fact by confirming disallowance of Rs. 57,732/- u/s 14A of the IT Act, 1961.*
4. *Comm. of Income Tax (A) erred in law and fact by accepting the calculation of disallowance u/s 14A made by AO and ignoring the fact that Interest was paid by appellant for business of trading in securities and not to earn exempt income.*
5. *The Appellant plead before your Hon'ble Tribunal to direct Assessing Officer to:*
 - I. *Allow calculation of long term capital gain on sale' of shares of BSE Ltd. as claimed in return of income.*
 - II. *Direct AO to calculate Disallowance u/s 14A after ignoring interest paid for business activity.*
6. *Appellant crave for leave of Hon'ble Tribunal to alter or amend any or all grounds of appeal before or at the time of hearing.”*

2. The brief facts of the case are that a return of income was filed on 19/8/2008 declaring total income of Rs. Nil. The case was selected under Computer Assisted Scrutiny Scheme (CASS) and notice u/s 143(2) was issued and served upon the assessee. In the present case the assessee is a share broker. For the AY 2008-09,

the assessee had shown long term capital gains of RS.2,37,17,838/-. Out of the same, Rs.90,72,890/- has been shown as gains on sale of shares of BSE Ltd. The assessee had sold 4562 shares of BSE Ltd. for a consideration of Rs. 2,37,17,838/- against which it has taken indexed cost of acquisition of Rs.14649510/-. The assessee was a holder of the BSE membership card which it had acquired in May 2000 for a value of Rs.43661500/-. The assessee had claimed depreciation on the BSE card as under

Rs 10915375 for AY 2001-02

Rs 8186531 for AY 2002-03

Rs 6139899 for AY 2003-04

Rs 4604924 for AY 2004-05

Rs 3453693 for AY 2005-06

In August 2005, the B~E, which was an AOP body, underwent demutualization and corporatisation. Under the said scheme the BSE card holders were allotted shares of Rs One each. The assessee had opted for the scheme and was allotted 20,000 shares for a price of Rs 20,000/-. Out of the same the assessee has sold the 4562 shares back to the BSE on 17/5/2007. It is on these sales that the assessee has claimed long term capital gains. While computing the long term Capital gains, the assessee has taken the cost of Rs 43661500/- plus Rs 20,000/- as the cost of acquisition of 20000 shares with a indexation from FY 2000-01.

The required notices were issued by the AO for which the assessee filed a detailed reply on 1.1.10 which form mentioned in the assessment order and after considering the reply AO passed the order of assessment u/s 143(3) of the Income-tax Act thereby computing the total income of the assessee.

3. Aggrieved by the order of the AO, the assessee filed appeal before the CIT(A) and the CIT(A) partly allowed the appeal but upheld the disallowance u/s 14A r.w. Rule 8D of the Income Tax Act and also upheld the rejection of appellant's claim of long term capital claim on sale of shares of BSE.

3.1 Aggrieved by the order of the CIT(A) the assessee filed the present appeal before us on the ground mentioned hereinabove.

Ground No. 1&2

4. Since both the ground are inter related and interconnected therefore we thought it fit to dispose off the same by common order. During the year under consideration, the assessee has sold shares of BSE Ltd which were acquired in the course of demutualization of stock exchange and offered long term capital gains in the computation of income. While calculating long term capital gains the assessee claimed the original cost of BSE card as per the provision of section 55(2)(ab) and

also claimed indexation on the same for AY 2001-02 i.e. date on which the assessee acquired ownership of BSE card.

5. However the assessing officer was of the view that since the assessee has claimed depreciation on BSE card, the assessee would not be allowed to take the original cost of acquisition in spite of the specific provisions of section 55(2)(ab) of the Act. In addition the AO was of the view that the indexation benefit cannot be granted to the assessee since the asset was not in existence before A.Y. 2007-08. Therefore, the assessing officer rejected the working of long term capital gains made by the assessee and disallowed original cost of acquisition and consequential deduction were made.

6. Subsequently, the Id. CIT(A) also upheld the stand of the Assessing Officer.

7. In order to controvert the findings recorded by the revenue authorities, Id. AR representing the assessee submitted that the issue is covered in favour of the assessee by the order of the Hon'ble Tribunal in the case of "M/s Parag Parikh Financial Services vs. ITO" being ITA No.3118/Mum/2012 for A.Y. 2008-09 dated 29.01.2014. We have analysed the finding recorded by the Hon'ble Tribunal in the aforesaid mentioned case and the operative paras are reproduced below.

“5) With regard to the applicability of S. 50 of the Act, it is submitted that the provisions of S. 50 of the Act apply only in cases where the appellant has claimed depreciation on the asset. It is submitted that the appellant has never claimed depreciation on shares and hence, the provisions of S. 50 of the Act will not apply in the present case.

6) In view of the same, it is humbly submitted that disallowance made by the Assessing Officer may kindly be deleted.

7) During the year under consideration, the appellant has received exempt income amounting to Rs.3,06,065/-.

8) The Assessing Officer calculated the disallowance u/s 14A read with Rule 80 at Rs. 57,732/-. The said disallowance comprises of interest amounting to Rs.46,067 and administrative expenses amounting to Rs.11,666/-. While calculating the average value of investments in computation of Rule 8D, the Assessing Officer has considered the shares held as stock in trade also.

9) The learned CIT (A) confirmed the disallowance made by the Assessing Officer.

10) It is submitted that while computing the disallowance u/s 14A of the Act, the amount of shares held as stock in trade should be excluded. In order to support the said contention, reliance is placed on the order of the Hon'ble Tribunal in the case of CIT v. India Advantage Securities Ltd (ITA No: 6711/Mum/2011) dated

14.09.2012 which has been subsequently upheld by the Hon'ble Bombay High Court in the case of CIT v. India Advantage Securities (ITA No: 1131 of 2013). Reliance is also placed on the order of the Hon'ble Tribunal in case of Dy. CIT v. Shree Durga Capital (ITA No:7405/Mum/2011) dated 03.08.2015.

11) Without prejudice to the above, it is humbly submitted that no interest disallowance can be made u/s 14A of the Act since own funds of the assessee i.e. share capital + reserves are sufficient to cover up the value of investments. In order to support the said contention, reliance is placed on the following decisions.

a) CIT v. Reliance Utilities [313 ITR 340 (Bom)]

b) CIT v. HDFC Bank [366 ITR 505 (Bom)]

c) M/s. Alchemic Financial Services Ltd. vs. Addl. CIT in ITA No. 6349/Mum/11 for A.Y. 2008-09.”

8. After analyzing the afore mentioned findings we are of the view that it has been rightly held that as per specific provisions of section 55(2)(ab) of the Act, the cost of acquisition in relation to equity shares allotted to a shareholder under a scheme of demutualization or corporatization shall be the cost of acquisition of his original membership of exchange. It has also been rightly held that for determining the holding period of capital asset being equity shares allotted in pursuance to demutualization or corporatization of recognized stock exchange, the period for

which the assessee was a member of recognized stock exchange prior to such demutualization or corporatization shall also be included as per clause (ha) to Explanation 1 to section 2(42A). Therefore, respectfully following the principles laid down by the Hon'ble Tribunal we also hold that for the purpose of calculating long term capital gains, the cost of acquisition shall be the original cost of membership of exchange and the indexation would also be allowed for the period from which the assessee was a member of stock exchange.

8.1 Now, coming to the applicability of section 50 of the Act, we have noticed that the provisions of section 50 of the Act would only apply in cases where the assessee has claimed depreciation on the asset, but in the present case the assessee has never claimed depreciation on shares and therefore, the provisions of section 50 of the Act are not attracted in the present case and hence, from the totality of the facts and circumstances of the case we delete the disallowance made by the AO and confirmed by the CIT(A).

Ground No. 3&4

9. Since both the grounds are inter-connected and inter-related therefore we thought it fit to dispose off the same by the common order.

9.1 It is admitted in the case that during the year under consideration, the assessee has received exempt income amounting to Rs.3,06,065/-. The Assessing Officer calculated the disallowance u/s 14A r.w.Rule 8D at Rs.57,732/- and said disallowance comprises of interest amounting to Rs.46,067/- and administrative expenses amounting to Rs.11,666/-. While calculating the average value of investments in computation of Rule 8D, the AO has considered the shares held as stock in trade also.

9.2 In this respect it is submitted by the ld. AR representing the assessee while computing the disallowance u/s 14A of the Act, the amount of shares held as stock in trade should be excluded. In order to support the ld. AR relied on the order of the Hon'ble Tribunal in the case of "CIT vs. India Advantage Securities Ltd" (ITA No. 6711/Mum/2011) dated 14.09.2012 which has been subsequently upheld by the Hon'ble Bombay High Court in the case of "CIT vs. India Advantage Securities Ltd" (ITA No. 1131of 2013). In addition ld. AR also placed reliance on the order of the Hon'ble Tribunal in the case of Dy. CIT vs. Shree Durga Capital (ITA No. 7405/Mum/2011) dated 03.08.2015.

9.3 We have analysed the order passed in the aforesaid mentioned case by the Hon'ble Tribunal in ITA No. 6711/Mum/2011 the operative portion is reproduced below.

“5. We have perused the records and considered the rival contention carefully. The dispute is regarding the disallowance of expenses u/s.14A in relation to the exempt dividend income received from shares held on trading account. The A.O. disallowed the expenses holding that the provisions of section 14A were applicable even in relation to the dividend received from the trading shares. The Ld.CIT(A) has however held that the provisions of section 14A will not apply to the shares held on trading account. The Revenue has placed reliance on the decision of Mumbai Bench of the Tribunal in the case of M/s. American Express Bank Limited (supra) in which the Tribunal has held that the expenditure u / s.14A has to be disallowed even in respect of dividend income received from trading shares. The Tribunal followed the decision of the Special Bench of the Tribunal in the case of ITA vs. Daga Capital Management Pvt. Ltd. (supra). The assessee in that case had relied on the judgment of Hon'ble High Court of Kerala in the case of CIT vs. Smt. Leena Ramachandran (339 ITR 296) to argue that the disallowance could not be made in relation to the dividend received from trading shares. The Tribunal had however, distinguished the said judgment of Hon'ble High Court of Kerala on the ground that in that case the acquisition of shares with the borrowed funds was for the purpose of controlling the company. Therefore, even though the purpose for acquiring the shares was business, the High Court had upheld the disallowance u/s.14A of the I.T. Act. The Tribunal also noted that the

High Court in that case had only observed that the interest paid on borrowed funds utilised for acquiring shares could be allowed as deduction u/s.36(1)(iii) only if shares were held as stock-in-trade. These observations were only obiter dicta and not the ratio decided of the judgment. The ratio decided of the judgment was disallowance of interest u/s.14A which had been upheld by the Tribunal. The Tribunal, therefore, did not accept the arguments based on the judgment of Hon'ble High Court of Kerala in the case of Smt. Leena Ramachandran (supra) which was not directly on the issue of disallowance of expenses in relation to the dividend income received from trading in shares.

6. *However, the Hon'ble High Court of Karnataka have recently considered the disallowance of expenses incurred on borrowings made for purchase of trading shares u/s.14A of the LT. Act in case of CCL Ltd. vs. JCIT (supra). The assessee in that case was distributor of state lotteries and a dealer in shares and securities. The assessee had taken loans for the purchase of certain shares and it had incurred expenditure for broking the loans which had been disallowed under Rule 8D by the A.O. and confirmed Ld.CIT(A). The Tribunal agreed with the authorities below expenditure relatable to earning of dividend income though incidental the trading in shares was also to be disallowed u/s.14A of the I.T.Act The Tribunal however, had observed that the entire broking commission was not relatable to earning of dividend income as the loan had been utilised for the purchase of shares and the profit shown from the sale of shares had been offered as business income. The Tribunal, therefore, directed the A.O. to bifurcate the expenditure proportionately. The order of the Tribunal was however, not upheld by the Tribunal. The High Court noted that 63% of shares which were purchased were sold*

and income derived was offered to tax as business income. The remaining 30% of shares which remained unsold had reverted to dividend income for which the assessee had not incurred any expenditure at all. The High Court also observed that the assessee had not retained the shares with the intention of earning dividend income which was incidental due to his sale of shares which remained unsold by the assessee. The High Court, therefore, did not uphold the order of the Tribunal disallowing the expenditure in relation to the dividend from shares. Thus there being a direct judgment of a Hon'ble High Court on this issue, the same has to be followed in preference to the decision of the Special Bench of the Tribunal in the case of M/s. Daga Capital Management P. Ltd. (supra). Infact, we note that the Tribunal in the case of Ganjam Treading Co. Ltd. supra) has already considered this situation and held that in view of the judgment of Hon'ble High Court of Karnataka in the case of CCL Ltd. Vs. JCIT (supra) the disallowance of interest in relation to the dividend received from trading shares cannot be made. We, therefore, see no infirmity in the order of the Ld. CIT(A) in deleting the disallowance u/s.14A computed by the A.O. in relation to the stock-in-trade. The order of the Ld.CIT(A) is accordingly upheld.

7. In the result, the appeal filed by the Revenue is dismissed.

9.4 The afore mentioned ITA No. 6711/Mum/2011 were also challenged before the Hon'ble Bombay High Court and the Hon'ble Bombay High Court has dismissed the appeal of the Revenue and the operating para while upholding the order of the Tribunal is reproduced below:

“4. Before us, the Id. DR appearing for the Revenue assailed the order of the Ld.CIT(A). It was submitted that the provisions of section 14A were applicable even in relation to the dividend income received from the trading in shares as held by the Special Bench of the Tribunal in the case of ITO vs. M/s. Daga Capital Management P. Ltd. (117 ITD 169). He also referred to the latest decision of the Tribunal dated 08.08.2012 in ITA No.5904 & 6022/Mum/2000 in the case of M/s. American Express Bank Limited. The Id. AR for the assessee, on the other hand, submitted that issue was covered in favour of the assessee by the latest judgment of the Hon'ble High Court of Karnataka in the case of CCL Ltd. Vs. JCIT (250 CTR 291) in which it has been held that no disallowance could be made u/s.14A in respect of dividend income received from the shares held as trading stock. It was pointed out that following the said judgment, the Mumbai Bench of the Tribunal in the case of Ganjam Treading Co. P. Ltd. in the order dated 20.07.2012 in ITA No.3724/Mum/2005 have held that the decision of the Special Bench of the Tribunal in the case of M/ s. Daga Capital Management P. Ltd. (supra) was not applicable in the case of dividend received shares. The Id. AR for the assessee also relied on the decision Tribunal in the case of Yatish Trading Co. (P) Ltd. vs. ACIT (129 ITD 237) and the decision in the case of Prakash K. Shah & Securities P. Ltd. vs. ACIT in ITA No.3339/Mum/2010.”

10. From the co-joint reading of orders passed by the Hon'ble High Court as well as the Hon'ble Tribunal it is clear that while computing disallowance u/s 14A

of the Act, amount of shares held as stock in trade should be excluded. Therefore relying upon judgement passed above we also hold accordingly.

11. Apart from the above it was also argued by the ld. AR that no interest disallowance can be made u/s 14A of the Act since the assessee was having his own funds i.e. share capital, reserves are sufficient to cover up the value of investment. In order to support his contention ld. AR relied in the case of “CIT Vs. HDFC Bank” [366 ITR 505 (Bom)] further it has been observed that the interest income is more than interest expenditure and since net interest is positive, no interest disallowance can be made u/s 14 A of the Act. In order to support his contention, reliance is placed on the order of the Hon’ble Tribunal in the case of “DCIT vs. Trade Apartments” being (ITA No. 1211/Kol/2011) dated 30.03.2012 and “Morgan Stanley India Securities vs. Asst. CIT” being (ITA No. 5072/Mum/2005) dated 13.04.2011. It was also submitted that no interest disallowance can be made u/s 14A of the Act. In addition ld. AR also submitted that no satisfaction has been recorded while rejecting the claim of the assessee for making disallowance u/s 14A of the Act. It was also submitted that the AO has calculated the disallowance u/s 14A r.w. Rule 8D of the Act without considering the principles and guidelines laid down by the High Court in the case of “Godrej & Boyce Vs. CIT” (328 ITR 81).

12. On the other hand ld. DR relied upon the lower authorities.

13. We have heard the counsels of both the parties and we have perused the material on record and the orders passed by the lower authorities. We have also considered the judgement referred above and after co-joint proceeding of the judgment, while Id. AR as well as keeping in view the legal said prosecution we are of the considered opinion that in the present case the assessing officer has recorded no satisfaction while rejecting the claim of the assessee for making disallowance u/s 14A of the Act. In the present case the assessee having his own funds and out of the total disallowance calculated u/s 14A r.w. Rule 8D of the Act of Rs.57,732/-. The said disallowance comprises of interest amounting to Rs.46,067/- and administrative expenses amounting to Rs.11,666/-. After applying the principles laid down by the Jurisdictional authorities, we are of the considered view that no amount on account of interest can be calculated when the assessee is having either the owned funds and therefore we restrict the disallowance of Rs.11,666/- u/s 14A r.w. Rule 8D and in this respect AO is directed to recalculate after making disallowance.

This ground of appeal is partly allowed.

14. Ground no. 5 &6 are general in nature and needs no separate adjudication in view of the decision on above grounds.

15. In the result, the assessee's appeal is partly allowed.

Order pronounced in the open court on 24th February, 2016

Sd/-
(R.C. Sharma)

लेखा सदस्य / Accountant Member

Sd/-
(Sandeep Gosain)

न्यायिक सदस्य / Judicial Member

मुंबई Mumbai; दिनांक Dated :24.02.2016

Ps. Ashwini

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 - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai