

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

**BEFORE SHRI RAJENDRA, HON'BLE ACCOUNTANT MEMBER AND
SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER**

ITA.No.767/MUM/2014 (A.Y: 2008-09)

Deputy Commissioner of Income
Tax -10(3), R.No. 451, 4th Floor,
Aayakar Bhavan, M.K. Road,
Mumbai - 400 020

v. M/s. Bombay Oxygen Corporation
Limited, 22/B, Mittal Tower "B" wing,
Nariman point, Mumbai – 400 021

PAN: AAACB 1753 A

(Appellant)

(Respondent)

**CO.No.133/MUM/2017 (A.Y: 2008-09)
(ARISING OUT OF ITA.No.767/MUM/2014)**

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(Appellant)

(Respondent)

Assessee by : Shri Manish V. Shah, C.A.

Shri Ikshu shah

Revenue by : Shri Vidusha Kalra

Date of Hearing : 13.07.2017

Date of Pronouncement : 13.09.2017

ORDER

PER C.N. PRASAD (JM)

1. The appeal and Cross Objection are filed by the Revenue and the assessee against the order of the Commissioner of Income Tax (Appeals)-21 Mumbai dated 01.11.2013 for the Assessment Year 2008-09.

2. The first ground in the Revenue's appeal is directed against deleting the disallowance u/s 14A r.w. Rule 8D2(ii).in respect of interest expenditure.

3. Briefly stated the facts are that the Assessing Officer while completing the assessment noticed from the computation statements that the assessee earned dividend income from mutual funds at ₹.1,41,28,910/- and dividend income from shares at ₹.80,978/- and the same was claimed as exempt u/s 10 of the Act. Assessee was required to give the details of expenditure for earning exempt income. The assessee submitted its reply that no expenses were incurred for earning dividend income and the investments were made out of surplus funds of the assessee. Not convinced with the submissions of the assessee and not satisfied with the claim of the assessee that no expenditure was incurred for earning exempt income, the Assessing Officer invoking the

provisions of Rule 8D computed the disallowance at ₹.78,96,449/- comprising of interest of ₹.37,28,564/- under Rule 8D2(ii) and towards administrative expenses of ₹.35,56,410/- being 0.5% of average value of investments under Rule 8D2(iii).

4. Assessee preferred an appeal before the Ld.CIT(A) and the Ld.CIT(A) in so far as interest is concerned accepted the contentions of the assessee that the investments were made out of own funds, deleted the interest disallowance. While coming to the said conclusion Ld.CIT(A) examined the bank account of the assessee and found that the funds were invested from out of the sale proceeds of land and there is one to one correlation. Following the decision of the Hon'ble Bombay High Court in the case of Reliance Utilities and Power Ltd [313 ITR 340] Ld.CIT(A) deleted the disallowance. However, he sustained the disallowance in respect of the administrative expenses of ₹.35,56,410/- being 0.5% of the average investments.

5. Ld. DR placing reliance on the order of the Assessing Officer submits that Ld.CIT(A) is not justified in deleting the interest disallowance.

6. We have heard the rival submissions perused the orders of the authorities below. On perusal of the order of the Ld.CIT(A) we find that the interest expenditure was deleted based on the fact that assessee

made investments from out of the sale of land and no borrowed funds were utilized for such investments. Thus, the order of the Ld.CIT(A) in deleting the interest under Rule 8D2(ii) is sustained.

7. Coming to the Cross objection filed by the assessee in respect of the disallowance under Section 14A, assessee contends that the investments not yielded income during the year should be excluded for the purpose of computing the average investments under Rule 8D2(iii). Ld. DR supported the orders of the lower authorities.

8. We have heard the rival submissions, perused the orders of the authorities below. Coming to the submissions made under Rule 8D2(iii) towards administrative expenses the assessee contended before the Ld.CIT(A) that section 14A cannot be applied to those investments from which no dividend is received. The assessee also placed reliance on the Hon'ble Bombay High Court in the case of Delite enterprises (ITA.No. 110 of 2009). and also the Coordinate Bench in the case of Avshesh Mercantile P. Ltd. v. DCIT in ITA.No. 5779/MUM/2006 dated 13.06.2012. This issued stands covered by the recent decision of the Special Bench in the case of ACIT v. Vireet Investments Private Limited [82 Taxman.com 415] wherein the Hon'ble Special Bench held that only those investments are to be considered for computing the average value of investments

which yielded exempt income during the year. Thus, respectfully following the said decision we direct the Assessing Officer to compute the disallowance under Rule 8D2(iii) in accordance with the decision of the Special Bench (supra)

9. The second and last issue in the appeal of the Revenue is that the Ld.CIT(A) erred in holding that the Assessing Officer does not have any relevant circumstances for referring the matter to the Valuation Officer u/s 55A(b)(ii) of the Act and deleting the addition on account understatement of capital gains.

10. Briefly stated the facts are that the Assessing Officer while completing the assessment noticed that in the return of income assessee declared long term capital gain of ₹.164,02,62,678/- on sale of land and claimed exemption u/s 56EC of the Act. Assessing Officer also noticed that assessee claimed indexed cost of acquisition at ₹.31,32,65,612/- by adopting the cost as on 01.04.1981 at ₹.5,68,54,013/-. Assessing Officer noticed that revaluated cost of the land at ₹.5,68,54,013/- as on 01.04.1981 was taken on the basis of valuation report of the Registered Valuer. Assessing Officer was of the view that the fair market value as on 01.04.1981 arrived by the Registered Valuer does not based upon any comparative sale instance in the immediate vicinity of the locality. He was

also of the opinion that the estimation made by the Registered Valuer did not have any basis. Therefore, the property was referred to Departmental Valuation Officer (in short "DVO") u/s 55A(b)(ii) of the Act to find out the fair market value of the property as on 01.04.1981 and as on 04.02.2008. The DVO determined the fair market value of the property at ₹.3,58,00,000/- as on 01.04.1981 and ₹.200,69,00,000/- as on 04.02.2008 in his report submitted to the Assessing Officer. Adopting the valuation report of the DVO the Assessing Officer computed the Capital gains at ₹.176,31,70,290/- and brought the difference of ₹.12,29,07,612/- as understatement of capital gains.

11. Assessee preferred an appeal before the Ld.CIT(A) and contended that value adopted by the assessee based on the Registered Valuer's report is only for the land and this value is much more than the fair market value as determined by the DVO and therefore, the reference is bad in law by placing reliance on various decisions in support of its contentions. It was also contended that there are no special circumstances for referring the matter for valuation as contemplated in section 55A(b)(ii) of the Act. Considering the submissions and the case laws relied on the Ld.CIT(A) held that the reference made by the Assessing Officer to DVO u/s 55A(b)(ii) is bad in law and the addition made on account of understatement of capital gains is deleted.

12. Before us, the Ld. DR vehemently supported the orders of the Assessing Officer. The Ld. DR submits that the Assessing Officer has absolute power for making reference u/s 55 to find out fair market value of the property. Ld. DR further submits that land in question is industrial as well as residential but Registered Valuer has taken only one rate. Therefore, the Ld. DR submits that the reference made by the Assessing Officer is in accordance with the provisions of the section 55A(b)(ii).

13. The Learned Counsel for the assessee vehemently supported the orders of the Ld.CIT(A). Learned Counsel for the assessee further submits that the property sold is only a land and the administrative block on such land. Therefore, there are no circumstances warranting for reference u/s 55A(b)(ii) of the Act. Ld. Counsel placing reliance on the decision of the Hon'ble Jurisdictional High Court in the case of CIT v. Puja Prints [360 ITR 697] and submits that when the value of the asset claimed by the assessee is more than the fair market value arrived by the DVO, the reference made u/s 55A(b)(ii) of the Act to find out the fair market value is bad in law.

14. We have heard the rival submissions, perused the orders of the authorities below. The only reason given by Assessing Officer in the Assessment Order before referring the valuation to the DVO for such

reference is that, the fair market value as on 01.04.1981 arrived by the Registered Valuer of the assessee is not based upon any comparative sale instances and the estimation made by the Registered Valuer did not have any basis. This is the only reason the Assessing Officer recorded for refereeing the matter for valuation u/s 55A(b)(ii). The Assessing Officer has not given any extraordinary circumstances and the circumstances warranting for reference in relation to the asset in question for reference u/s 55A(b)(ii) of the Act. The reference u/s 55A(b)(ii) can only be made in the circumstances when it does not fall u/s 55A(a). The Assessing Officer has not given any reasons why the reference should not be made u/s 55A(a) and why it should be made u/s 55A(b)(ii) which is a residuary provision. Admittedly in this case the valuation adopted by the Registered Valuer is based on the stamp duty valuation and the stamp duty valuation was applied only on the land portion excluding the structures i.e administrative building on such land. Therefore, the observation of the Assessing Officer that valuation adopted by Registered Valuer has no basis is not correct. On a perusal of the DVO's report we observe that the fair market value determined by the DVO is much less than the value adopted by the assessee which is based on the stamp duty valuation. Similarly, the sale consideration as on 04.02.2008 adopted at

₹.200 Crores by the assessee is much more than the stamp duty valuation of ₹.176 Crores.

15. The Hon'ble Jurisdictional High Court in the case of CIT v. Puja Prints considered a case the value adopted by the assessee based on a Registered Valuer's report is more than the fair market value arrived at by the DVO, whether in such circumstances the reference can be made u/s 55A(a) or even u/s 55A(b)(ii) and the Hon'ble Jurisdictional High Court dismissed the appeal of the Revenue holding that there is no substantial question of law and affirmed the order of the Tribunal in holding that the reference u/s 55A(a) is bad in law when the value adopted by the assessee is more than the fair market value adopted by the DVO. The Hon'ble Jurisdictional High Court also held that the contention of the Revenue that the reference to the Departmental Valuation Officer by the Assessing Officer is sustainable in view of section 55A(b)(ii) of the Act is not acceptable for the reason that it clearly stated in section 55A(b) that it would apply in any other case i.e. case not covered by section 55A(a) of the Act. The Hon'ble High Court held as under: -

"6. We have considered the rival submissions. We find that the impugned order dated 18 February, 2011 allowing the respondent-assessee's appeal holding that no reference to the Departmental Valuation Officer can be made under Section 55A of the Act, only follows the decision of this Court in the matter of Daulal Mohta HUF (supra). The revenue has not been able to point out how the aforesaid decision is

inapplicable to the present facts nor has the revenue pointed out that the decision in Daulal Mohta HUE (supra) has not been accepted by the revenue. On the aforesaid ground alone, this appeal need not be entertained. However, as submissions were made on merits, we have independently examined the same.

7. We find that Section 55A(a) of the Act very clearly at the relevant time provided that a reference could be made to the Departmental Valuation Officer only when the value adopted by the assessee was less than the fair market value. In the present case, it is an undisputed position that the value adopted by the respondent-assessee of the property at Rs.35.99 lakhs was much more than the fair market value of Rs.6.68 lakhs even as determined by the Departmental Valuation Officer. In fact, the Assessing Officer referred the issue of valuation to the Departmental Valuation Officer only because in his view the valuation of the property as on 1981 as made by the respondent-assessee was higher than the fair market value. In the aforesaid circumstances, the invocation of Section 55A(a) of the Act is not justified.

8. The contention of the revenue that in view of the amendment to Section 55A(a) of the Act in 2012 by which the words "is less than the fair market value" is substituted by the words "is at variance with its fair market value" is clarifactory and should be given retrospective effect. This submission is in face of the fact that the 2012 amendment was made effective only from 1 July 2012. The Parliament has not given retrospective effect to the amendment. Therefore, the law to be applied in the present case is Section 55A(a) of the Act as existing during the period relevant to the Assessment Year 2006-07. At the relevant time, very clearly reference could be made to Departmental Valuation Officer only if the value declared by the assessee is in the opinion of Assessing Officer less than its fair market value.

9. The contention of the revenue that the reference to the Departmental Valuation Officer by the Assessing Officer is sustainable in view of Section 55A(a) (ii) of the Act is not acceptable. This is for the reason that Section 55A(b)of the

Act very clearly states that it would apply in any other case i.e. a case not covered by Section 55A(a) of the Act. In this case, it is an undisputable position that the issue is covered by Section 55A(a) of the Act. Therefore, resort cannot be had to the residuary clause provided in Section 55A(b)(ii) of the Act. In view of the above, the CBDT Circular dated 25 November 1972 can have no application in the face of the clear position in law. This is so as the understanding of the statutory provisions by the revenue as found in Circular issued by the CBDT is not binding upon the assessee and it is open to an assessee to contend to the contrary.”

16. In the case on hand also the case is covered by section 55A(a) since value of the asset claimed by the assessee is on the basis of the estimation made by the Registered Valuer. Therefore, in our opinion the issue is squarely stands covered by the decision of the Hon'ble Jurisdictional High Court. Thus, respectfully following the said decision we uphold the order of the Ld.CIT(A) in holding that the reference to DVO is bad in law. We sustain the order of the Ld.CIT(A) on this issue.

17. In the result the appeal of the Revenue is dismissed, cross objection filed by the assessee is partly allowed.

Order pronounced in the open court on the 13th September, 2017.

Sd/
(RAJENDRA)
ACCOUNTANT MEMBER

Mumbai / Dated 13/09/2017
VSSGB, SPS

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mum