

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ ।
IN THE INCOME TAX APPELLATE TRIBUNAL,
"C" BENCH, AHMEDABAD
BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER
AND
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

आयकर अपील सं./ ITA.No.2017/Ahd/2013
निर्धारण वर्ष/ Asstt. Year: 2010-11

DCIT, Cir.8 Ahmedabad.	Vs	Shri Mayur Mukundbhai Desai A/1, Maharaja Complex Opp. Rasranjan Nr. Vijay Cross Roads Navrangpura, Ahmedabad. PAN : AELPD 7897 M
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अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
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Revenue by :		Shri Prasoon Kabra, Sr.DR
Assessee by :		None

सुनवाई की तारीख/Date of Hearing : 07/11/2017
घोषणा की तारीख /Date of Pronouncement: 16/11/2017

आदेश/O R D E R

PER MAHAVIR PRASAD, JUDICIAL MEMBER:

This appeal has been preferred by the assessee against order of the ld.CIT(A)-XIV dated 27.5.2013 and following grounds have been taken:

- 1. The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in deleting the disallowance of Rs.9,23,637/- out of total disallowance of Rs.11,01,769/-made u/s.14A, r.w.r. 8D.*
- 2. The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in treating the profit on sale of shares as long term capital gain only instead of business income treated by the Assessing Officer ignoring the fact! that Assessee was*

engaged in both F&O and cash segment of equity market utilizing interest bearing borrowed fund.

3. *On the facts and in the circumstances of the case, the Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad ought to have upheld the order of the Assessing Officer.*

4. *It is therefore, prayed that the order of the Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad may be set-a-side and that of the order of the Assessing Officer be restored.”*

2. Facts of the case are that the assessee is engaged in the business of transport and share trading. It is seen that the assessee has made various investments in the shares of Indian companies. The assessee has received dividend of Rs.24,30,008/- from the investments which is exempt u/s.10 of the Act. Thus, the assessee has earned huge amount of exempted income by way of investments of substantial funds in the shares and other investments. Therefore, disallowance u/s.14A r.w.r. 8D was clearly warranted. The investment made by the assessee in the beginning of the year was of Rs.10,00,14,214/- on 1.4.2008 and investment at the close of the year as on 31.3.2010 was of Rs.27,66,50,661/-. Thus, the assessee was asked to show cause as to why disallowance u/s.14A should not be made as the assessee is in receipt of exempt income. In response to the said notice, the assessee filed submission, which is reproduced as under:

"1, Your good self has asked for working of Disallowance u/s. 14A.

In this respect, we would like to bring to your notice that the assessee has not incurred any expenditure which is attributable to Exempt Income. However, before asserting that we would like to bring to your notice the provisions of Section 14A which is as under:

14A(1) : For the purposes of Computing Total Income under this Chapter, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of total income under this Act.

3

(2): The assessing officer shall determine the amount of expenditure incurred in relation to such income which does not form part of total income under this Act. In accordance with such method as may be prescribed (as per Rule 8D), if the assessing officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income of the Act.

(3): The provisions of sub section (2) shall also apply in relation to a case where an assessee claims that no expenditure has been incurred by him in relation to income which does not form part of total income under this Act.

In this regard it is submitted that:

- i. The assessee is having tax free incomes, in the form of Dividend of Rs.24,30,808/-. The assessee has not incurred any expenditure related to the borrowing i.e. Interest on the funds invested in the Shares. The investment is made out of own capital, interest free funds or out of sale of old investments.

It is submitted that interest of Rs. 1,64,075/- is paid for Car Loan & Tanker Loan to Reliance Capital Ltd. & HDFC Bank. Against this expense the assessee is having Car Rent Income of Rs.6,90,000/- and Transport Income of Rs.1,14,63,546/-. Thus the interest is paid for specific assets, which is attributable against Car Rent Income & Transport Income; hence, no disallowance can be made for the purpose of Rule 8D r.w.s. 14A.

Interest of Rs.2,82,290/- was paid for Housing Loan, which is not attributable to any Investment; hence, no disallowance can be made for the purpose of Rule 8D r.w.s. 14A.

Loan Interest Exps. of Rs. 58,24,315,32/- is paid for Investment in Debentures from which Interest Income of Rs. 82,58,554/- is earned; hence, no disallowance can be made for the purpose of Rule 8D r.w.s. 14A.

The assessee is personally looking after the Investment Activity and there is no expenditure incurred by him on this account. So the method provided under Rule 8D(2)(iii) is not applicable, as there is in fact no expenditure of such nature claimed by the assessee in Profit & Loss A/c against any Exempt Income. The breakup of expenses claimed in Profit & Loss A/c are as under:

Nature of Expense	Amount	General Expense	Explanation
Bank Charges	2,821.00	2,821.00	Of General Nature

<i>Depreciation</i>	<i>17,83,146.00</i>	<i>0</i>	<i>On Car, Tanker & Office Equipment related to Tanker Business</i>
<i>E TDS Fees</i>	<i>30.00</i>	<i>30.00</i>	<i>Of General Nature</i>
<i>Finance Charges</i>	<i>1,64,075.00</i>	<i>0</i>	<i>Related to Car Rent Income & Transport Business Income</i>
<i>House Loan Interest</i>	<i>2,82,290.00</i>	<i>0</i>	<i>For Housing Loan</i>
<i>LIC Premium</i>	<i>24,895.00</i>	<i>0</i>	<i>Disallowed in ITR</i>
<i>Office Repairing exps.</i>	<i>10,500.00</i>	<i>10,500.00</i>	<i>Of General Nature</i>
<i>Internet Exps.</i>	<i>9,927.00</i>	<i>9,927.00</i>	<i>Of General Nature</i>
<i>Legal Fees</i>	<i>12,500.00</i>	<i>12,500.00</i>	<i>Of General Nature</i>
<i>Professional Fees</i>	<i>19,854.00</i>	<i>19,854.00</i>	<i>Of General Nature</i>
<i>Professional Tax</i>	<i>2,400.00</i>	<i>0</i>	<i>Claimed against Salary Income</i>
<i>Staff Salary</i>	<i>1,22,500.00</i>	<i>1,22,500.00</i>	<i>Of General Nature</i>
<i>STT Charges</i>	<i>50,495.00</i>	<i>0</i>	<i>Disallowed u/s. 8D(2)</i>
<i>TDS Late Deposit Interest</i>	<i>38.00</i>	<i>0</i>	<i>Disallowed in ITR</i>
<i>Vehicle Repairing Exps.</i>	<i>16,785.00</i>	<i>0</i>	<i>Claimed against Car Rent Income</i>
<i>Vehicle Insurance Exps.</i>	<i>1,08,741.00</i>	<i>0</i>	<i>Claimed against Car Rent Income</i>
<i>Total:</i>	<i>26,10,997.00</i>	<i>1,78,132.00</i>	

Thus, the total general expense claimed in Profit & Loss A/c is Rs.1,78,132/- which are mainly towards Tanker Business. Most of the other expenses are of specific nature and has no relevance to earning tax free income.

- iv. Without prejudice to our above submission, further it is submitted that it is settled law that if no expenditure is claimed there cannot be any disallowance. In this regard, the assessee most respectfully relies on the*

ratio laid down by the **Hon'ble P&H High Court** in the case of **CIT v. Winsome Textiles Ind. Ltd. 329 ITR 204 (P & H) Page No. 37 to 39**). In this case the Hon'ble High Court has held' "

i. "Since in this case, the assessee has not incurred any expenditure for making investment in the purchase of shares in Winsome Yarns Ltd., no disallowance is warranted u/s. 14A. We therefore find no justification to interfere with the order of CIT(A) in having deleted the disallowance. The ground of appeal raised by the Revenue in this regard is thus dismissed."

v. The assessee also relies on the ratio laid down by the P & H High Court in the case of **CIT v. Hero Cycles Ltd. 323 ITR 518(P & H)Page No. 34 to 36**. In this case the Hon 'ble High Court held that:

i. "4. In view of finding reproduced above, it is clear that the expenditure on interest was set off against the income from interest and the investments in the shares were out of the Dividend Proceeds. In view of these finding of fact, disallowance u/s. 14A was not sustainable. Whether, in a given situation, any expenditure was incurred, which was to be disallowed, is a question of fact. The Contention of the Revenue that directly or Indirectly some expenditure is always incurred which must be disallowed u/s 14A and the impact of the expenditure so incurred cannot be allowed to be set off against the Business Income J which may nullify the mandate of Section 14A. cannot be accepted. Disallowance u/s 14A requires finding of incurring of expenditure; where it is found that for earning exempted income no expenditure has been incurred, disallowance u/s 14A cannot be stand. In the present case finding on this aspect, against the Revenue, is not shown to be perverse, consequently, disallowance is not permissible."

vi. Without prejudice to our claim that no expenditure is incurred in earning exempted income, the assessee furnishes the working as per Rule 8D as under:

Particulars	Amount	Amount
Rule8D(2)(i)	50,495.00	Rs. Nil, as this amount is already disallowed by the assessee in Computation of Income.
The amount of Expenditure directly relation to Income which does not form part of total income		
Rule 8D(2)(ii) Expenditure incurred by way of interest during the P.Y. which is not directly attributable to any particular income or receipt but directly or indirectly relation to earning exempt income.		

As per Formula – A X B/C		
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A. Expenditure by way of interest other than the amount of interest included in clause 1 incurred during the P.Y. (See Point No. 3 (ii) above).		
B1 . The average value of investment, Investment as on 31/03/2009 (Other than LIC Rs. 1,00,000 & PPF Rs. 12,38,831 & 1 Share Application Money Rs. 1,72,00,000 & Rs. 3,10,000)	8,11,65,384.00	
B2. The average value of investment, Investment as on 31/03/2010 (Other than LICRs. 1,10,000 & PPF Rs. 14,13,071 & Share Application Money Rs. 2,02,00,000 & Rs. 3,10,000)	25,46,17,590.00	
B. Average Value of Investment	$(8,11,65,384 + 25,46,17,590) / 2 = 16,78,91,487.00$	
C1. Total Assets on 31/03/2009	15,84,81,445.00	
C2. Total Assets on 31/03/2010	41,29,04,903.00	
C. Average Value of Total Assets	$(15,84,81,445 + 41,29,04,903) / 2 = 28,56,93,774.00$	
Now, AXB/C=	$OX \ 16,78,91,487 / 28,56,93,174 =$	0
Rule 8D (2) (iii) 0.5 % of Average Investment (B) i.e.	$0.5 \ % \ X \ 16,78,91,487.00 = 8,39,457.00$	
However above may kindly be restricted to Rs. 18,000 i.e. 10% of General Expense of Rs. 1,78,132.00		18,000.00
Total Disallowance:		18,000.00

Thus if at all, you are not inclined to agree to our contention, we request your good self to kindly restrict the disallowance under Rule 8D(2)(iii) to Rs. 78,0007-only, as hardly 10% of general expense of Rs.1,78,132/-or say Rs. 78,0007-might be expended for the purpose of Investment, the same in turn may be said to be expended in earning Dividend Income.

We would further like to submit as under:

In the appeal of the assessee's case for the A.Y. 2009-10 vide order in Appeal No. CIT(A) XIV/ACIT(OSD) Cir. 8/141/2011-12 dated 15/05/2012. The Ld. CIT(A) XIV had held in para 2.3 as under:

"I have carefully perused the assessment order and the submission given by the appellant. The appellant has claimed that the disallowance of 5,02,722.00 made by the A.O. should be restricted to General Expense of Rs.2,42,344.00 — shown in the P & L A/c. It has been claimed by the appellant that for considering the disallowance u/s 14 A, the expenses which are generally in nature should only be considered and the expenses of specific nature such as tender fees, vehicle insurance, professional tax, STT Charges, House Loan Interest, Finance Charges, Depreciation on Car and Office related to Tanker business should not be considered. The issue is similar to the one which was raised by the appellant for A. Y. 2008-09. While deciding the appeal for that year, the claim of the appellant was accepted. Following my decisions for A. Y. 2008-09, the claim of the appellant is accepted for this year also. The A. O. is directed to restrict the disallowance to Rs. 2,42,344.00 which are general in nature. The Ground of appeal is partly allowed."

We request your good self, to kindly consider the disallowance u/s 14A, in light of the above facts, submissions and explanations."

3. On perusal of the statement of income submitted during the course of assessment proceedings, it is seen that the assessee has shown long term capital gain of Rs.1,71,733/- from the sale of shares of Synapses Sys. P.Ltd. Further, the assessee has shown long term capital gain of Rs.78,21,689/- on sale of shares of Adani Enterprises and the same is claimed as exempt income. On perusal of balance sheet of the assessee, it is seen that against the total funds of Rs.41,29,04,902/- as on 31.3.2010, borrowed funds are reflected at Rs.29,49,86,202/-. Further, against the capital of Rs.11,87,80,533/- investments are reflected at Rs.27,66,50,661/- as on 31.3.2010. Thus, funds are being borrowed for making investments. Use of borrowed funds for

making investments indicated that the activity of making investments in the shares is more in the nature of business activity rather than investment activity. On perusal of the balance sheet, it is also seen that the shares are reflected as investments as well as stock-in-trade. The assessee submitted his reply as below:

"5. The assessee is consistently following the accounting policy of keeping the shares as investment in his books of account. He has shown the shares as investment since last many years. His accounts are regularly audited, his returns are regularly filed and his returns are regularly scrutinized by the Income Tax Department. Till A. Y. 2009-10 whatever transactions in shares have taken place were reflected as either capital gain or capital loss. This practice is also verified in his Previous Income Tax Assessments and was consistently approved by Income Tax Department.

During the year the assessee has started maintaining two separate portfolio of share Investment. All the old shares which are reflected in the books are kept under Investment Portfolio. However, all the shares which were purchased during the year and sold during the same year were reflected as shares held for trading. The details of such shares were already submitted on 30/10/2012 along with . explanation of AIR Transactions as per Annexure No.6. Any gain / loss on transaction of these shares is shown as business income in the return of the assessee."

4. Finally income of Rs.1,51,53,540/- was assessed by the AO. Against the said order, the assessee preferred first statutory appeal before the Id.CIT(A) who partly allowed the appeal of the Id.CIT(A).

5. We have gone through the relevant record and impugned order and heard the Id.DR. Appellant has claimed that the disallowance of Rs.11,01,769/- made by the AO should be restricted to the general expenses of Rs.1,78,132/- shown in the P&L account. It has been claimed by the appellant that for considering the disallowance u/s.14A, the expenses which are general in nature should only be considered and the expenses of specific nature such as tender fee, vehicle insurance, professional tax, STT charges, house loan interest, finance charges, depreciation on car and office

equipments related to tanker business should not be considered. The issue is similar to the one which was raised by the appellant for A.Ys.2008-09 and 2009-10. While deciding the appeal for that year, claim of the appellant was accepted. Since in earlier years claim was accepted by the department, so, in our considered opinion, the Id.CIT(A) judicially and correctly directed the AO to restrict the disallowance to Rs.1,78,132/-.

6. So far as shares of Adani Enterprises are concerned, the Id.CIT(A) held as under:

3.3: Decision:

I have carefully perused the assessment order and the submissions given by the appellant. AO has emphasized that the appellant has borrowed funds for investment into shares, hence, it has become an adventure into a nature in trade. Consequently, LTCG disclosed in return of income have been assessed as business income. The evidences filed have been carefully examined. I could not find specific findings or fund flow analysis showing that borrowed funds have gone into investment in acquisition of shares of Adani Enterprise Ltd. and Synapse System Pvt. Ltd. (SSPL). On the other hand, the appellant contends that this is a new issue emerging in the year under consideration although he has been investor into shares for long time. The appellant has submitted various documents indicating the working of Long Term Capital Gains (Adani Enterprise shares) as under:

Sl. No.	Scrip	No. of shares	Sale value	Date of sale	Purchase value	Purchase date	LTCG
1	Adani Enterprise	2000	1075,813	19/05/09	427,940	27/02/07	647,873
2	Adani Enterprise	3000	2212,353	14/07/09	641,910	27/02/07	1570,443
3	Adani Enterprise	1098	921,654	20/07/09	234,939	27/02/07	686,715
4	Adani Enterprise	1902	1596,527	20/07/09	400,542	28/02/07	1195,985
5	Adani Enterprise	1500	1258,628	21/07/09	315,585	28/02/07	942,743
6	Adani Enterprise	500	423,972	23/07/09	105,295	28/02/07	318,677
7	Adani Enterprise	1900	1565,513	31/07/09	400,121	28/02/07	1165,392

10

8	Adani Enterprise	2100	1736,100	31/07/09	442,239	28/02/07	1293,861
		14000	10790,560		2968,871		7821,689

The year-wise details have been perused and it is noticed that the appellant has sold 14000 shares of Adani Enterprise, out of total 36726 shares which should have resulted into closing stock of 22726 shares. However, it is noticed that the closing stock of Adani Enterprise is at 45452 shares which includes 22726 bonus shares, The allotment of bonus shares gives indication that the appellant is a genuine investor.

The another profit on sale of shares is relating to Synapse System Pvt. Ltd. which is claimed as has been held by the appellant for more than 6 years. The AO has also not allowed LTCG on this and held it to be business income. The perusal of details on record indicates the LTCG shown by appellant are arrived as under:

Closing balance of SSPL as on 31/03/2005 = Rs.13,19,000/-

Sale of SSPL shares on 25/05/2009 =Rs. 19,80,000/-

Profit - =Rs. 6,61,000/-

My attention is drawn to the ratio laid down by ITAT, Mumbai in the case of Janak S. Rangwalla Vs. ACIT [11 SOT 627 (Mumbai)] in which it is held that- ;

"In the facts of the present case, the assessee is holding the shares as investment from year to year. It is the intention of the assessee which is to be seen to determine the nature of transaction conducted by the assessee. Though the investment in shares is on a large magnitude but the same shall not decide the nature of transaction. Similar transactions of sale and purchase of shares in the preceding years have been held to be the income from capital gains both on long term and short term basis. The transaction in the year under consideration on account of sale and purchase of shares is same as in the preceding years and the same merits to be accepted as short term capital gains. There is no basis for treating the assessee as a trader in shares, when his intention was to hold the shares in Indian companies as an investment and not as stock-in-trade. The mere magnitude of the transaction does not change the nature of transaction, which are being assessed as income from capital gains in the past several years. The AO is directed to set off the long term capital loss against the short term capital gain of the year under consideration. The grounds of appeal raised by the assessee are allowed."

The Honourable Bombay High Court in the case of CIT Vs. Gopal Purohit reported in 228 CTR 582 (Bom) has categorically held that the delivery based transactions have to be treated as investment transactions and the profit received there from is to be treated as short-term or long-term capital gains depending upon the period of holding. The Court also held that the Tribunal has correctly held that though the principle of Res Judicata is not attracted since each assessment year is different in itself; there has to be uniformity in treatment and consistency when the facts and circumstances are same/identical. The SLP filed against the judgment in the case of CIT Vs. Gopal Purohit (supra) has since been rejected by Apex Court, therefore, the judgment has become final. In view of ratio laid down by various judicial orders mentioned above, I am inclined to agree with the appellant. The AO is directed to tax an amount of Rs.78,21,689/- and Rs.6,61,000/- as LTCG as disclosed in return of income.

The AO is also directed to allow the set off of previous year's Short Term Capital Loss of Rs. 3,950/- as claimed by the appellant as per law. The grounds of appeal are accordingly **allowed.**"

7. In the case of CIT Vs. Gopal Purohit reported in 228 CTR 582 (Bom) it is categorically held that the delivery based transactions have to be treated as investment transactions and the profit received there from is to be treated as short term or long term capital gains depending upon the period of holding. The Court also held that the Tribunal has correctly held that though the principle of *res judicata* is not attracted since each assessment year is different in itself, there has to be uniformity in treatment and consistency when the facts and circumstances are same and identical. The Id.CIT(A) rightly directed the AO to tax an amount of Rs.78,21,689/- and Rs.6,61,000/- as long term capital gain as disclosed in the return of income, and he also rightly directed the AO to allow the set off of short term capital loss of Rs.3,950/- as claimed by the appellant. In our considered opinion, there is no infirmity in the order of the Id.CIT(A) and the Id.CIT(A) has passed detailed

and judicious orders. In view of the above observations, findings of the ld.CIT(A) does not require any interference.

8. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the Court on 16th November, 2017 at Ahmedabad.

**Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER**

**Sd/-
(MAHAVIR PRASAD)
JUDICIAL MEMBER**

Ahmedabad; Dated 16 /11/2017