

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH : KOLKATA

[Before Hon'ble Shri N.V.Vasudevan, JM & Shri M.Balaganesh, AM ]

I.T.A No. 310/Kol/2015

Assessment Year : 2010-11

Kishan Gopal Mohta  
[PAN: ADQPM 0469 E]  
(Appellant)

-vs-

JCIT, Range-35,Kolkata  
  
(Respondent)

I.T.A Nos. 634 & 635/Kol/2016

Assessment Year : 2011-12 & 2012-13

Kishan Gopal Mohta  
[PAN: ADQPM 0469 E]  
(Appellant)

-vs-

ACIT, Circle-35,Kolkata  
  
(Respondent)

For the Appellant : Shri P.J. Bhide, Advocate  
For the Revenue : Shri G. Mallikarjune, CIT DR

Date of Hearing : 30.11.2017

Date of Pronouncement : 03.01.2018

**ORDER**

**Per M.Balaganesh, AM**

1. These appeals by the assessee arise out of the separate orders of the Learned Principal Commissioner of Income Tax(Appeals)-XII, Kolkata [in short the Id CIT]] in Memo No. CIT-12/KOL/Tech/263/2014-15/2072-75, Memo No. Pr. CIT-12/Kol/Tech/263/2015-16/2553-55 and Memo No. Pr. CIT-12/Kol/Tech/263/2015-16/2549-51 dated 30.01.2015, 21.03.2016 respectively passed u/s 263 of the Act against the separate orders passed by the JCIT, Range-35, Kolkata, ACIT, Circle-35, Kolkata [ in short the Id AO] under section 143(3) of the Income Tax Act, 1961 (in

short “the Act”) dated 22.03.2013, 14.02.2014 and 25.03.2015 respectively for the Assessment Years 2010-11 to 2012-13 respectively.

2. The only issue to be decided in this appeal is as to whether the Ld. CIT was justified in invoking revisionary jurisdiction u/s 263 of the Act for these three years, in the facts and circumstances of the case in the context of disallowance u/s 14A read with Rule 8D of the Rules.

3. The brief facts of this issue is that the assessee had filed his return of income for the assessment year 2010-11 on 30.09.2010 declaring taxable income of Rs. 2,77,13,292/-. The assessee derives income from investment and trading in shares, capital gains and income from other sources. The assessee is doing his share transaction business in his proprietorship concern under the name and style of (i) M/s Kishan Gopal Mohta and (ii) Kishan & Co. and both the concerns are situated at 7, Lyons Range, Kolkata-700001. The assessee furnished the revised computation of total income during the course of assessment proceedings admitting the revised income of Rs. 2,79,40,410/- which was accepted by the Ld. AO. In the course of assessment proceedings, the Ld. AO sought to make disallowance u/s 14A of the Act read with Rule 8D of the Rules. The assessee stated that he had voluntarily disallowed the sum of Rs. 21,29,607/- u/s 14A read with rule 8D covering all the three limbs of the Rules. The assessee has duly furnished the workings for the same. From the said workings, the Ld. AO observed that the assessee had considered interest payment of Rs. 5,50,899/- as against 6,51,829/- and accordingly recomputed the disallowance under Rule 8D to the tune of Rs. 22,30,842/-. In other words, the excess disallowance made by the Ld. AO u/s 14A read with Rule 8D worked out to Rs. 1,01,235/- (2230842 - 2129607). The assessment was completed by the Ld. AO u/s 143(3) of the Act on 22.03.2013 for the Asst Year 2010-

11 determining the total income of Rs. 2,82,39,620/-. No appeal was preferred against this order by the assessee on this issue.

4. The Ld. CIT sought to revise the assessment framed by the Ld. AO on 23.03.2012 treating it as erroneous in as much as it is prejudicial to the interest of the revenue on the ground that the Ld. AO had not made properly verified the workings for disallowance u/s 14A read with Rule 8D of the Rules. According to the Ld. CIT, total interest paid by the assessee on borrowed funds works out to Rs. 1,61,44,852/- which should have been considered by the Ld. AO while working out the disallowance made under Rule 8D(2)(ii) of the Rules. The assessee replied before the Ld. CIT that the assessee gave the workings of utilization of borrowed funds for the purpose of business and for the purpose of making investments, the proportionate interest attributable thereon were considered by the assessee while making the disallowance under Rule 8D(2)(ii). It was further pleaded that the Ld. AO had not made any disallowance u/s 36(1)(iii) of the Act which goes to prove that the borrowed funds were indeed utilized only for the purpose of business of the assessee. It was also pleaded that the Ld. AO had made due enquiries about the entire issue of disallowance u/s 14A of the Act read with Rule 8D of the Rules and hence, the same issue cannot be the subject matter of revision proceeding u/s 263 of the Act on the ground of improper enquiries by the Ld. AO. It was also pleaded before the Ld. CIT that the dividend income was earned by the assessee in respect of investments held as stock-in-trade and therefore, the nature of income received thereon would only tantamount to business income derived by the assessee. It was pleaded that though the dividend income is taxable under the head income from other sources and claimed as exempt u/s 10(34) of the Act, the character of the said receipt, being the business income in view of shares held as stock-in-trade, does not undergo any change. In this regard, the assessee placed reliance on the decision of Hon'ble Supreme Court in the case of UCO Bank vs. CIT reported in 32

ITR 688 (SC) and Hon'ble Madras High Court in the case of CIT vs. Shri Kishan Chand Mal reported in 58 ITR 26 (Mad). The Ld. CIT ignored all the contentions of the assessee and directed the Ld. AO to adopt the interest paid figure of Rs. 1,61,44,852/- as against Rs. 6,51,821/- considered by the ld. AO for the purpose of working out the disallowance under Rule 8D(2)(ii) on the ground that the Ld. AO had not considered the issue in the right perspective. Accordingly, he directed the Ld. AO to make necessary investigation of the above issue and passed a fresh order after granting reasonable opportunity of being heard to the assessee. Aggrieved, the assessee is in appeal before us on the following grounds:

*1. That on the facts and circumstances of the case the Ld. Commissioner of Income Tax, Kolkata-12, erred in assuming jurisdiction u/s 263 of the Act.*

*2. That the order passed by the Ld. Commissioner of Income Tax on 27.01.2015 u/s 263 of the Act, setting aside the assessment order passed by the Assessing Officer u/s 143(3) of the Act on 22.03.2013 is bad in law.*

*3. That on the facts and circumstances of the case determination of the amount disallowable u/s 14A of the Act, there could be two opinions and hence, invocation of prov. 263 of the Act by the Ld. CIT is bad in law.*

*4. That the appellant craves leave to submit further grounds and to amend, alter or otherwise modify the grounds already taken, if necessary, before or at the time of hearing of Appeal.*

5. The Ld. AR at the outset placed before the copy of the section 142(1) questionnaire issued by the Ld. AO dated 31.01.2013 for the assessment year 2010-11 wherein a specific query was raised with regard to disallowance u/s 14A read with Rule 8D of the Rules. He also drew our attention to the assessment order wherein the Ld. AO have made elaborate discussion on the issue of disallowance u/s 14A read with Rule 8D and had even enhanced the disallowance by Rs. 1,01,235/-. He argued that this clearly goes to prove that the Ld. AO had duly applied his mind on the subject mentioned issue and hence, the same cannot be considered as lack of enquiry by the Ld. AO. It cannot be

said that the same amounts to incorrect assumption of facts or misinterpretation of law on the part of the Ld. AO. Accordingly, he argued that the same cannot be the subject matter of revision u/s 263 of the Act. He also stated on merits that admittedly no disallowance of interest paid on borrowed funds was made u/s 36(1)(iii) of the Act by the Ld. AO, which goes to prove that borrowed funds had been used only for the purpose of business of the assessee. He stated that the assessee had paid interest on the following grounds :

i) To Bank	:	Rs. 5,50,899/-
ii) To City Corp Finance	:	Rs. 1,00,921/-
iii) To Kotak Securities	:	Rs. 8545/-
iv) To Morgan Stanley	:	Rs.7908088/-
v) To KMPL	:	Rs. 7576398/-
Total	:	Rs. 16,144,852/-

He argued that the assessee had received dividend of Rs. 1,22,53,286/- and claimed the same as exempt u/s 10(34). He even drew our attention to page 25 of the paper book which was filed before the Ld. CIT as under:

**i) Interest bearing loans used entirely for business purposes:**

Name of Party	Loan Amount	Interest Amount
a) Morgan Stanley India Pvt. Ltd	80288152	2806097
b) Kotak Mahindra Pvt. Ltd.	64141181	7576398
c) Kotak Securities Limited	0	8545
d) Morgan Stanley India Pvt. Ltd.	66273233	4398194
<b>Total</b>	<b>210702566</b>	<b>14789234</b>

**ii) Loans used for dividend yielding investments:**

<b>Name of Party</b>	<b>Loan Amount</b>	<b>Interest Amount</b>
a) BNP Paribas	0	77854
b) ABN Amro Bank	1206991	74556
c) HDFC Bank	0	444
d) IDBI Bank	1820500	154419
e) ICICI Bank	1608973	128635
f) Axis Bank	1908149	114991
<b>Total</b>	<b>6544613</b>	<b>550899</b>

**iii) Interest paid on cash loan:**

<b>Name of Party</b>	<b>Loan Amount</b>	<b>Interest Amount</b>
a) Citycorp Finance India Pvt. Ltd.		100921

**iv)** It was further stated that interest amount of Rs. 703707/- was paid on the loan from Morgan Stanley Capital India Pvt. Ltd. which was used for investment in shares. It was also stated before the Ld. CIT that this sum should not be allowed by the Ld. AO u/s 14A.

6. The Ld. AR however argued that this sum of Rs. 703797/- was not at all discussed by the Ld. CIT in his entire revision order u/s 263 of the Act. The Ld. CIT did not

discuss the breakup of the loans and its utilization thereon as detailed above in his revision order. He further argued that the dividend income derived by the assessee would be treated only as business income of the assessee as admittedly the shares were held as stock-in-trade by the assessee. In support of this, he placed reliance on the decision of Hon'ble Punjab & Haryana High Court in the case of Pr. CIT vs. State of Patiala reported in 391 ITR 218 (P& H) wherein it has held that the CBDT Circular No. 18 dated 02.11.2015 curves out a distinction between stock-in-trade and investment and provides that if the motive behind purchase and sale of shares is to earn profit then it would be treated as trading profit and if the project is to derive income by way of dividend then the profit would be said to have accrued from the investment. If the assessee is found to have treated the shares and securities as stock-in-trade, the income arising there from would be business income and loss would be a business loss. He further argued that no disallowance under section 14A of the Act would apply for shares held as stock-in-trade as held by the Hon'ble Jurisdictional High Court in the case of CIT vs. G.K.K. Capital Markets Pvt. Ltd. reported in 392 ITR 196 (Cal). He finally argued that in the instant case, three views are possible:

- i) Disallowance u/s 14A made by the assessee voluntarily;
- ii) Disallowance u/s 14A made by the Ld. AO;
- ii) Disallowance u/s 14A contemplated by the Ld. CIT;

Hence in this scenario when a view has been taken by the Ld. AO after due appreciation of facts and application of mind, the same has to be construed as one of the possible views and revisionary jurisdiction u/s 263 would not lie on the same. In this regard, the Ld. AR placed reliance on the decision of Hon'ble Supreme Court in the case of CIT vs. Max. India Ltd. reported in 295 ITR 282 (S C).

7. In response to this, the Ld. DR argued that the Ld. CIT had duly discussed the calculation made by the Ld. AO in his order. He pointed out to the details of interest paid on loans filed by the assessee before the Ld. CIT which is enclosed in page 25 of the paper book wherein the assessee himself has agreed for disallowance of interest of Rs. 703797/- to be considered for worked out the disallowance under Rule 8D(2)(ii). Hence, on this ground itself the revisionary jurisdiction u/s 263 of the Act would lie as it clearly proves the non-application of mind by the Ld. AO and it also proves that the Ld. AO had proceeded on incorrect assumption of facts. He argued that the Ld. CIT has only set aside to the file of the Ld. AO to make proper enquiries in the facts of the case. He argued that the Ld. AO had not taken any view in this matter. He placed reliance on the decision of this Tribunal in the case of Kalyani Barter Pvt. Ltd. vs. ITO reported in 163 ITD 571 wherein it was held that the disallowance under 14A would be applicable for shares held as stock-in-trade. The availability of own funds as argued by the Ld. AR had not been conclusively proved by the assessee as having used for investments, which should have been verified by the Ld. AO.

8. In defence, the Ld. AR argued that there was absolutely no whisper about the disallowance of interest in the sum of Rs. 703797/- as agreed by the assessee in the entire order of Ld. CIT u/s 263 of the Act. This goes to prove that the Ld. CIT had completely ignored the entire contentions of the assessee and had proceeded to revise the assessment with a pre-conceived notion of treating the order of the Ld. AO as erroneous and prejudicial to the interest of the revenue. He also argued that the Ld. CIT however held that stock-in-trade is not included in the current assets by the assessee which is factually incorrect as could be evident from the perusal of the balance sheet.

9. We have heard the rival submissions and perused the materials available on record including the paper book filed by the assessee. At the outset, we find that the entire

exercise of the revisionary jurisdiction u/s 263 of the Act had been invoked by the Ld. CIT on the aspect of arriving at figure of disallowance u/s 14A read with Rule 8D of the rules. The assessee had voluntarily disallowed Rs. 2129607/- u/s 14A read with Rule 8D(2) of the Rules under all the three limbs. The core dispute arises with regard to adoption of figure of interest to be considered for disallowance under 2<sup>nd</sup> limb of Rule 8D(2). In this regard, the assessee had disallowed a sum of Rs. 327590/- by considering the interest paid of Rs. 550899/-, whereas the Ld. AO had considered the interest payment at Rs. 651821/-. There is also similar difference of adoption of average value of investment and average value of total assets in the said computation between the assessee and the Ld. AO. Since, there is a difference in adoption of average value of investments figure between the Ld. AO and the assessee, there is a consequential difference of disallowance figure to the tune of Rs. 29585/- under the third limb of 8D(2) also. We find that the Ld. AO had issued a specific questionnaire 142(1) dated 31.01.2013 raising a specific query with regard to disallowance u/s 14A read with Rule 8D during the course of assessment proceedings for the Asst Year 2010-11. The Ld. AO on consideration of detailed reply given by the assessee had elaborated in his assessment order as to the applicability of the Rule 8D of the Rules and workings thereon and under each limb of Rule 8D(2) and had completed the assessment accordingly. Hence, this cannot be said as lack of enquiry by the Ld. AO on this aspect. It is not in dispute that the assessee had filed the entire details of interest paid before the Ld. AO vide reply to previous questionnaire issued u/s 142(1) of the Act dated 16.08.2012 vide point no. 12 thereon. We also find that the Ld. AO had raised a query on utilization of interest bearing secured and unsecured loans for the purpose of business and others vide section 142(1) questionnaire dated 31.01.2013 in point no. 13 thereon. The Ld. AO on due satisfaction of the replies given thereon proceeded not to make any disallowance of interest as diverted for non-business purposes u/s 36(1)(iii) of the Act. Hence this goes to prove that the assessee had given the entire details of

interest payment on borrowed funds and its specific utilization thereon before the Ld. AO itself and the Ld. AO had taken a conscious decision on the same and had not disallowed any interest u/s 36(1)(iii) of the Act. This goes to prove that the interest payments other than Rs. 651821 have been used by the assessee only for his business purposes and not for any investments. We find that even though the assessee had agreed before the Ld. CIT that a sum of Rs. 703797/- represents interest payment being utilized for investment in shares which ought to have been considered for disallowance under second limb of Rule 8D(2) of the Rules, the Ld. CIT had not looked into the same and had not even whispered about the same in his entire revision order. Apart from this, we also find that the Ld. CIT had made a mention that stock-in-trade is not included in current assets of the assessee in his balance sheet which is factually incorrect. We have perused the balance sheet of the assessee which is enclosed in the paper book and which is forming part of the records of the lower authorities. From the same, we find that the assessee has dual portfolio i.e. shares held as investments as well as shares held as stock-in-trade. In view of the same, we hold that in the facts and circumstances of the case disallowance u/s 14A of the Act read with Rule 8D of the Rules need to be made in the instant case. Hence, reliance placed on the decision of the Hon'ble Jurisdictional High Court reported in 392 ITR 196 (Cal) need not be adjudicated upon. To this extent, the argument placed by the Ld. DR deserves to be appreciated. From the perusal of the balance sheet, we find that the assessee has sufficient own funds to make the investments and hence the reliance placed by the Ld. AR on the decision of Hon'ble Bombay High Court in the case of CIT vs. Reliance Utilities and Power Ltd. reported in 313 ITR 340 (Bom) is correct. However, in the instant case, the assessee had voluntarily disallowed Rs. 21,29,607 by applying all the three limbs of Rule 8D. Hence we are not inclined to get into the availability of own funds as far as applicability of Rule 8D(2)(ii) in the instant case.

9.1. Now, we are left only with the legal ground wherein whether the revision jurisdiction could at all be exercised by the Ld. CIT in the instant case. We find that the Ld. AO had made elaborate enquiry about the aspect of 14A and had taken a possible view on the same while discussing it elaborately in his assessment order. At the cost of repetition, we would like to mention that the Ld. AO had not made any disallowance of interest u/s 36(1)(iii) of the Act which goes to prove that the interest paid other than Rs. 651821/- have been used only for the purpose of business of the assessee and not for the purpose of making investments in shares. When the possible view has been taken by the Ld. AO after taking into consideration facts and circumstances of the case and after raising a specific query with regard to complete details of interest payments vis-à-vis its utilization, and after raising a specific query with regard to disallowance under Rule 8D of the Rules, it cannot be said that the Ld. AO had not applied his mind or had proceeded on incorrect assumption of facts as alleged by the Ld. CIT in his revision order.

9.2. In view of the aforesaid facts and findings we held that the entire revisionary jurisdiction exercised by the Ld. CIT u/s 263 of the Act is not sustainable in law in view of the ratio laid down by the Hon'ble Supreme Court in the case of CIT vs. Max. India Pvt. Ltd. reported in 295 ITR 282 (S C). Accordingly, the grounds raised by the assessee for the assessment year 2010-11 are allowed.

10. We find that the Ld. CIT had passed revision order u/s 263 of the Act on the very same issue for assessment years 2011-12 and 2012-13. We find that the Ld. AO had disallowed an additional amount of Rs. 68,526/- & 32,441/- over and above the amounts disallowed by the assessee voluntarily u/s 14A read with Rule 8D of the Rules under all the three limbs. In both these orders, the Ld. AO had issued detailed questionnaire to the assessee vide 142(1) notice for assessment years 2011-12 and

2012-13 raising specific query in this regard and assessment has been completed after due consideration of the reply received by the assessee and after proper application of mind by the Ld. AO. Accordingly the decision rendered herein above for the assessment year 2010-11 would apply with equal force for assessment years 2011-12 and 2012-13 also except in variance in figures. Accordingly, the grounds raised by the assessee for the assessment years 2011-12 and 2012-13 are allowed.

11. In the result, all the appeals of the assessee are allowed.

**Order pronounced in the Court on 03.01.2018**

Sd/-  
 [N.V. Vasudevan]  
 Judicial Member

Sd/-  
 [ M.Balaganesh ]  
 Accountant Member

Dated : 03.01.2018  
 SB, Sr. PS

Copy of the order forwarded to:

1. Kishan Gopal Mohta, Room No. 2A, 2<sup>nd</sup> Floor, Kolkata Stock Exchange Building, 7, Lyons Range, Kolkata-700001.
2. JCIT, Range-35, Kolkata, Aayakar Bhawan (Poorva), 8<sup>th</sup> Floor, 110, Shantipally, E.M.Bye Pass, Kolkata-700107.
- 3..C.I.T.(A)- , Kolkata 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary  
 Head of Office/D.D.O., ITAT, Kolkata Benches