

**IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH KOLKATA**

**BEFORE SHRI A. T VARKEY, JM & DR. A.L.SAINI, AM**

**आयकर अपीलसं./ITA No.265/Kol/2016**

**(निर्धारणवर्ष / Assessment Year: 2009-10)**

<b>SPT Securities Pvt. Ltd.</b> 11, Clive Row, 2 <sup>nd</sup> Floor, Kolkata – 1.	<b>Vs.</b>	<b>DCIT, Circle-5, Kolkata</b> Ayakar Bhavan, P-7, Chowringhee Square, Kolkata – 69.
स्थायी लेखासं./जी आइ आर सं./PAN/GIR No. :AADCS 8015 P		
<b>(ASSESSEE)</b>	<b>..</b>	<b>(RESPONDENT)</b>

Assessee by : Shri Subash Agarwal, Advocate.  
Respondent by : NONE

सुनवाई की तारीख/ **Date of Hearing** : 17/11/2017

घोषणा की तारीख/**Date of Pronouncement** : 12/01/2018

**आदेश / ORDER**

**Per Dr. Arjun Lal Saini, AM:**

The captioned appeal filed by the assessee, pertaining to assessment year 2009-10, is directed against the order passed by the Id. Commissioner of Income Tax (Appeals)–2, Kolkata, in Appeal No.987/CIT(A)-2/C-5/14-15 dated 14.12.2015, which in turn arises out of an order passed by the AO u/s.143(3) of the Income Tax Act 1961 (hereinafter referred to as the 'Act') dated 28.03.2011.

2. The assessee has raised the following grounds of appeal:

*"1. That the order of the Id. Commissioner of Income Tax is bad in law and on facts of the case.*

*2. That the Id. Commissioner of Income Tax (Appeals) erred in upholding the disallowance of Sub-brokerage payments to sub-brokers on the transactions related to shares and securities in spite of specific exclusion of the 'brokerage on shares trade' from the definition of 'Commission & Brokerage' in the Explanation to section 194H.*

*3. The Id. Commissioner of Income Tax (Appeal) also erred in holding that the Appellant could not prove the transaction to be related to the trading of shares of securities.*

*4. The Id. Commissioner of Income Tax (Appeals) further erred in upholding the addition u/s 14A in respect of shares held as stock by the Appellant Company.*

*5. That the appellant craves leave to adduce additional grounds or amend or alter any of the foregoing grounds before on at the time of the appeal."*

**3. The Ground Nos.1, 2 & 3 raised by the assessee relate to disallowance of Sub-brokerage payments to sub-brokers on the transactions related to shares and securities in spite of specific exclusion of the 'brokerage on shares trade' from the definition of 'Commission & Brokerage' in the Explanation to section 194H.**

3.1. The brief facts apropos this ground are that the assessee filed its return of income on 29.08.2009, declaring income of Rs.15,75,802/-. The assessee's return was duly processed u/s 143(1) on 07.12.2010. Later, the assessee's case was selected for scrutiny u/s 143(2) of the Act and the Assessing Officer made the addition on account of payment of sub-brokerage. During the assessment proceedings, it had been found that the assessee had paid sub-brokerage of Rs.10,67,725/- to its agents for doing share business in its name. When the assessing officer asked the assessee that why TDS was not deducted, the assessee had submitted that as per section 194H, TDS was not deductible on brokerage on securities. However, the AO noted that the sub-brokerage given to the agents was for doing business and not for sale of shares and securities. It was actually certain percentage of brokerage on securities transactions which was agreed to be given to its agents as commission. Therefore, it cannot be said that the sub-brokerage was against brokerage on securities, but it was for doing business on behalf of the company as its agents, which was fixed on the basis of the volume of the transactions. Thus, the payment was nothing but the commission to its agents for doing and increasing its business and, therefore, TDS on such payments should have been deducted. Therefore, the Assessing Officer disallowed the expenses of Rs.10,67,725/- u/s 40(a)(ia) of the Act.

3.2. Aggrieved by the addition made by the Assessing Officer u/s 40(a)(ia) of the Act at Rs.10,67,725/-, the assessee filed an appeal before the Id. CIT(A) who has confirmed the addition made by the Assessing Officer. During the appellate proceedings, the assessee submitted before the Id. CIT(A) that the

assessee is in the business of dealing in shares and securities. The assessee is a member of National Stock Exchange. The assessee has paid sub-brokerage of Rs.10,67,725/- to its sub-brokers for carrying on share business in its name. The assessee submitted before the CIT(A) that TDS is not deductible on brokerage of securities as per Section 194H, which reads as follows:

“Commission or Brokerage” includes any payment received or receivable, directly or indirectly, by a person acting on behalf of another person for services rendered ( not being professional services) or for any services in the course of buying or selling of goods or in relation to any transaction relating to any asset, valuable article or thing, not being securities”.

Therefore, assessee submitted before the CIT(A) that based on the definition of ‘commission and brokerage’ for the purpose of TDS u/s 194H, it is amply clear that tax is not deductible on transactions relating to shares and securities. However, the CIT(A) has ignored the submissions of the assessee and held that as per the Assessing Officer, assessee had made brokerage payments to some persons for doing business on behalf of the assessee company and the same was not against brokerage on securities, but for doing business on behalf of the assessee as its agents which was fixed for increasing the volume of transactions of the assessee. Thereafter, the Id. CIT(A) confirmed the addition made by the Assessing Officer u/s 40(a)(ia) of the Act at Rs.10,67,725/-.

3.3. Not being satisfied with the order of Id. CIT(A), the assessee is in appeal before us. The Id. Counsel for the assessee submitted that assessee made the payment to sub-brokers on the transactions related to shares & securities which is especially excluded from the definition of ‘commission or brokerage’. The Id Counsel drew our attention towards the explanation (i) of section 194H of the Act, wherein the definition of “commission or Brokerage” reads as follows:

*“Commission or Brokerage” includes any payment received or receivable, directly or indirectly, by a person acting on behalf of another person for services rendered ( not being professional services) or for any services in the course of buying or selling of goods or in relation to any transaction relating to any asset, valuable article or thing, **not being securities**”.*

Therefore, the Id. Counsel for the assessee has pointed out that as per the explanation (i) of section 194H of the Act, the securities are excluded from the TDS obligations. Apart from this, the Id. counsel for the assessee relied on the judgment of Hon'ble ITAT, Kolkata "A" Bench in ITA Nos.511&512/Kol/2012, in the case of Smt. Usha Chowdhury, A.Y. 2007-08 & 2008-09, wherein it was held that brokerage/commission paid in connection with the securities was not liable for deduction of tax at source. The Id. Counsel, therefore, submitted that it is very much clear from the explanation (i) of section 194H that 'Commission or brokerage' does not include transaction in securities. The belief of the assessing officer that assessee had made brokerage payments to some persons for doing business on behalf of the assessee is not based on any evidence. Therefore, TDS should not be deducted and the assessee is not liable to deduct TDS. Hence, the addition made by the Assessing Officer should be deleted.

3.4. On the other hand, Id DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity.

3.5. We have given a careful consideration to the rival submissions, and perused the materials available on record, we note that brokerage/commission paid in connection with the securities was not liable for deduction of tax at source, as mentioned in explanation 1 of section 194H of the Act, which is given below for ready reference:

*"Commission or Brokerage" includes any payment received or receivable, directly or indirectly, by a person acting on behalf of another person for services rendered ( not being professional services) or for any services in the course of buying or selling of goods or in relation to any transaction relating to any asset, valuable article or thing, **not being securities**".*

During the assessment proceedings and as well as in appellate proceedings, the assessee had submitted that TDS was not deductible on brokerage on securities. The assessee had paid brokerage on securities. On what basis, the assessing officer came on conclusion that brokerage was paid for doing business on behalf of the assessee, as its agents, and the commission was

fixed on the basis of volume of transactions, is not certain and is not based on any material evidence whatsoever.

On same identical facts, the coordinate ITAT Bench Mumbai, in ITA No.320/Mum/2009 in the case of S.J. Investment Pvt. Limited, held that the sub-brokerage paid in connection with the services rendered in the course of business of buying and selling of units of mutual fund or in relation to transactions pertaining to mutual fund is not covered by provisions of tax at source in view of the explanation (i) to section 194H of the Act.

We note that there is no material to even suggest that the commission had been paid in connection with increasing the assessee volume of transactions or for doing any other activity. Therefore, respectfully following the judgment of coordinate Bench Mumbai in the case of S.J. Investment Pvt. Limited,(supra), we hold that commission/brokerage of Rs.10,67,725/- is not liable for deduction of tax at source (TDS). Therefore, the disallowance made U/s 40(a) (ia), is deleted.

3.6 In the result, the appeal filed by the assessee (Ground No.1 to 3), are allowed.

**4. Next ground relates to addition made by the Assessing Officer u/s 14A r.w.r 8D in respect of shares held as stock by the assessee company.**

4.1. The facts apropos this ground are that as per Form No.3CA of the Tax Audit Report, the disallowance u/s 14A has been computed at Rs.9,78,908/-. The Assessing Officer based on the Tax Audit Report noted that considering the income and expenditure of the assessee, the computation u/s 14A was reasonable and therefore, he had added to the total income of the assessee to the tune of Rs.9,78,908/-.

4.2. Aggrieved by the order of the Assessing Officer, the assessee filed an appeal before the Id. CIT(A) who has confirmed the addition made by the Assessing Officer. During the appellate proceedings, the assessee submitted before the Id. CIT(A) that assessee company holds shares as stock-in-trade and

not as investments. The company is a registered share broking firm with National Stock Exchange and deals in securities as a business. The shares held as stock with a motive to earn profit and loss and not a meagre sum of tax free dividends. The company has been consistently following the same practice and has never claimed income by way of capital gains. The assessee relied on the judgment of Hon'ble Kerala High Court in the case of CIT vs. Smt. Leena Ramchandran wherein it was held that in case the interest or expense is related to purchase of shares to be dealt as business expenditure, the interest is allowable u/s 36 and as such Rule 8D is not applicable in the assessee's case under consideration. However, the Id. CIT(A) rejected the contention of the assessee and held that the assessee's own auditor computed this disallowance u/s 14A in his Tax Audit Report after considering the income and expenditure and quantum of inventories vis-a-vis investments. The assertion of the counsel of the assessee was that the assessee company had held shares as stock-in-trade and not investments, was not correct and misleading as the balance sheet shows investments in shares at Rs.140.07 lakhs against last year's investment of Rs.2.42 lakhs only. The Id. CIT(A) also held that the case laws referred by assessee are distinguishable on facts. The Id. CIT(A) further held that the Tax Auditor worked out the disallowance after considering the overall accounts of the assessee and the same was accepted by the Assessing Officer. Therefore, based on this the factual position, the CIT(A) confirmed the addition made by the Assessing Officer.

4.3. Not being satisfied with the order of the Id. CI(T)A, the assessee is in appeal before us. The Id. Counsel for the assessee has submitted before us that the issue relating to disallowance u/s 14A should be decided after taking into account the judgment of the Hon'ble ITAT Kolkata "A" Bench in the case of REI Agro Ltd. Vs. DCIT in ITA No.1331/Kol/2011 wherein it was held that not all investments become the subject-matter of consideration when computing disallowance u/s 14A r.w.r 8D. The disallowance u/s 14A r.w.r 8D is to be in relation to the income which does not form part of the total income and this can be done only by taking into consideration the investments which has given rise

to this income which does not form part of the total income. The Id. Counsel for the assessee submitted before us that for the purpose of making disallowance u/s 14A r.w.r 8D only interest bearing securities should be taken into account as per the judgment of REI Agro Ltd.(supra). The Id. Counsel also further submitted before us that shares in stock in trade should be excluded while computing disallowance under Rule 8D as per judgment of Hon'ble Calcutta High Court in the case of CIT vs. M/s G.K.K Capital Markets (P) Ltd., dated 10<sup>th</sup> February, 2017 wherein it was held that since the assessee does not have any investment and all the shares are held as stock-in trade as were evident from the order of lower authorities. The Hon'ble Calcutta High Court also held that "once, the assessee has kept the shares as stock in trade, the rule 8D of the Rules will not apply.

4.4. On the other hand, Id DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity.

4.5 We have given a careful consideration to the rival submissions and perused the materials available on record, we note that the Id. Counsel for the assessee has placed reliance on the judgment of Hon'ble Calcutta High Court in the case of CIT vs. M/s G.K.K Capital Markets (P) Ltd, GA No.1150 of 2015, dated 10.02.2017, wherein it was held that since the assessee does not have any investment and all the shares are held as stock-in trade as were evident from the order of lower authorities. The Hon'ble Calcutta High Court also held that the exempt income claimed treated to be business income and the shares held by the assessee having been treated as stock-in-trade.

4.6 On perusal of the Balance Sheet of the assessee, we note that assessee has shown investment under the head "Investments" Vide Schedule-E, for A.Y.2007-08 at Rs.2,42,725/- and for A.Y.2008-09 at Rs.1,40,07,725/-. We are of the view that for such investments which were held by the assessee under the head "Investments", (Not by way of stock-in –trade), the assessee is not entitled to take the benefit of the judgment of Hon'ble Calcutta High Court in the

case of CIT vs. M/s G.K.K Capital Markets (P) Ltd.(supra), because the shares/securities are held by the assessee as an “Investments”. That is, in order to take the benefit of the said judgment, the assessee should keep the shares and securities as stock in trade and in that situation the rule 8D of the Rules would not be applicable to the assessee. The assessee submitted before the CIT(A), (vide para 5.1 of CIT(A)` order), that assessee company holds shares as stock-in-trade and not as Investments, but we note that assessee keeps a large volume of shares under the head “Investments’ also. Based on the factual position, we are of the view that judgment of Hon’ble Calcutta High Court in the case of CIT vs. M/s G.K.K Capital Markets (P) Ltd.(supra) does not apply to the assessee under consideration.

4.7 We also note that the assessee has shown ‘Inventories of shares’ under the head current assets, loans and advances, vide schedule ‘F’, wherein the assessee has shown “shares in stock” in A.Y. 2007-08 at Rs.2,79,17,263/- and for A.Y. 2008-09 at Rs.82,48,215/- .We note that main business of the assessee( as claimed by the assessee and noted by AO) is to deal in shares and securities but at the same time he is keeping the shares and securities as an ‘Investments’ as discussed in para 4.6, above, of this order, therefore, it is not clear whether dividends were earned by the assessee out of the shares held as ‘Investments’ or shares held as ‘Stock -in -trade’, therefore the assessee is not entitled to take the benefit of the judgment of Hon’ble Calcutta High Court in the case of CIT vs. M/s G.K.K Capital Markets (P) Ltd.(supra).

4.8 We note that Id Counsel for the assessee has placed the reliance on the judgment of Hon’ble Calcutta High Court in the case of CIT vs. M/s G.K.K Capital Markets (P) Ltd.(supra), wherein it was held that computation methodology provided in Rule 8D is not applicable for shares held at stock-in-trade. But we find para 5.2 of the Id. CIT(A)`s order that there is a clear finding that assessee held the shares only as investments and not stock-in-trade. This finding has not been disputed by the Id Counsel, before us, hence reliance placed on aforesaid judgment of Hon’ble Calcutta High Court in the case of CIT

vs. M/s G.K.K Capital Markets (P) Ltd.(supra), does not come to rescue of the assessee.

4.9 Alternatively, the Id. Counsel argued that disallowance under Rule 8D should be made only after considering dividend bearing investments in the light of the judgment of Tribunal in the case of REI Agro Ltd.144 ITD 141, which we are inclined to agree. In REI Agro Ltd.(supra) this Tribunal held that only investments which has given rise to the exempted income should be taken into consideration while computing u/s 8D(2)(ii) & 8D(2)(iii) of the Rules. The AO is directed accordingly to compute the disallowance under section 14A read with Rule 8D.

4.10 In the result, appeal filed by the assessee (Ground no.4), is allowed for statistical purposes.

Order pronounced in the open court on this 12/01/2018.

Sd/-

(A. T. VARKEY)

न्यायिकसदस्य / JUDICIAL MEMBER

कोलकाता /Kolkata; दिनांक Dated 12/01/2018

RS,SPS

Sd/-

(DR. A.L.SAINI)

लेखासदस्य / ACCOUNTANT MEMBER

**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Assessee – SPT Securities Pvt. Ltd.
2. प्रत्यर्थी/ The Respondent-DCIT, Circle-5, Kolkata
3. आयकरआयुक्त(अपील) / The CIT(A), :Kolkata.
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, कोलकाता/ DR, ITAT, Kolkata
6. गार्डफाईल / Guard file.  
सत्यापितप्रति

//True Copy//

By Order

Senior Private Secretary,  
Head of Office/D.D.O,  
I.T.A.T, Kolkata Benches,  
Kolkata.