

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'E' NEW DELHI**

**BEFORE SHRI N. K. SAINI, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER
ITA No. 126/DEL/2015 (A.Y 2002-03)**

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| ITO Ward-17(1) New Delhi (APPELLANT) | Vs | Mohair Investment & Trading Co. Pvt. Ltd. 15, Aurangzeb Marg New Delhi AAACM0345D (RESPONDENT) |
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| Appellant by | Sh. S.R. Senapati, Sr DR |
| Respondent by | Sh. Gaurav Jain, Adv & Ms. Deepika Aggarwal, Adv |

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| Date of Hearing | 07.02.2018 |
| Date of Pronouncement | 27.02.2018 |

ORDER

PER SUCHITRA KAMBLE

This appeal has been filed by the Revenue against the order dated 28/10/2014 passed by CIT(A)-VIII, New Delhi.

2. The grounds of appeal are as under:-

“1. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred by observing that the disallowance made in the assessment order passed u/s 143(3) of the Income Tax, does not afford a ground for levy of penalty u/s 271 (1) (c) of the Income Tax, since the issue of disallowances was a debatable one?

2. That the order of the Ld. CIT(A) is erroneous and is not tenable on facts and in law.

3. *That the grounds of appeal are without prejudice to each other.”*

3. The assessee company filed its return for Assessment Year 2002-2003 on 24.10.2002 declaring a loss of Rs.6,43,44,465/-. The same was processed u/s 143(1) on 07.02.2003 at returned loss. Original assessment was completed u/s 143(3) on 29. 11.2004 at a Loss of Rs.2,75,06,595/-. The assessee company had claimed dividend income received of Rs.82,58,472/- as exempt income, however, no expenditure attributable to such earning of income was offered as disallowance u/s 14A of the Act as the assessee had no other activity. The expenditure claimed of Rs.3,68,15,492/- was disallowed u/s 14A of the Act. The disallowance made by the AO was confirmed by the CIT(A) vide order dated 07.11.2006 in appeal no. 169/04-05. The ITAT vide order dated 25.03.2009 in ITA No. 788/Del/2007 dismissed the appeal of assessee and directed the AO to compute the disallowance u/s 14A r.w.r. 8D. The assessee preferred further appeal before the Hon'ble High Court of Delhi. The Hon'ble High Court vide order in ITA No.263/2010 dated 18.11.2011 relying upon the judgment in the case of Godrej & Boyce Mfg. Co. Ltd. vs. CIT (2010 328 ITR 81 (Bom)) held that Rule 8D would be inapplicable retrospectively and directed to compute the disallowance on the basis of reasonable and acceptable method of apportionment. During the assessment proceedings, assessee claimed that no expenses was been incurred to earn dividend income. It was further submitted that the assessee being an investment company, the borrowing was for the purposes of the business of the assessee and the proceeds of such borrowing, were utilized for the purposes of the business, i.e., lending of money, repayments of earlier loan taken, regular expenses and acquisition of shares etc. Reply of the assessee was considered but not accepted by observing that Section 14A specifically mentions that the proportionate disallowance of expenses and the calculation of disallowance is to be made. Since the assessee had earned divided income of shares amounting to Rs.82,58,472/- on the shares which were held as investment , disallowance u/s 14A was required to be made. The assessee

company had accepted in their written reply that the amount borrowed was also utilized for acquiring the shares. Accordingly disallowance of Rs. 3,53,75,223/- was made U/s 14A of the IT Act,1961 and penalty for furnishing inaccurate particulars of income on this ground u/s 271(1)(c) was also initiated. Penalty notice dated 19.12.2012 u/s 274 read with section 271 of the I.T. Act 1961 was issued for concealment of income fixing the date of hearing on 27.12.2012. In their reply the assessee submitted that no penalty is leviable on the addition made during the assessment proceedings on the disallowance made u/s 14A and claimed the same as debatable. In the interest of natural justice another show cause notice was issued on 10.04.2013 by speed post fixing the hearing for 16.04.2012. Assessee filed adjournment letter on 16.04.2013 and on his request case was adjourned to 18.04.2013. Nobody appeared nor any application for adjournment has been received in this office. From the above facts of case, it is very clear that assessee has no explanation to offer. In view of the above, the Assessing Officer observed that since the disallowance u/s 14A is a statutory liability which was not fulfilled by the assessee company which reflects the conscious and deliberate attempt on the part of the assessee to conceal/furnish inaccurate particulars of its true taxable income. Accordingly the penalty u/s 271 (1)(c) of the IT Act was imposed upon the assessee.

4. Being aggrieved by the penalty order the assessee filed appeal before the CIT(A). The CIT(A) allowed the appeal of the assessee.

5. The Ld. DR submitted that the CIT(A) erred in observing that the disallowance made in the assessment order passed u/s 143(3) of the Income Tax Act, 1961 does not afford a ground for levy of penalty u/s 261(1)(C) of the Income Tax Act, since the issue of disallowance was debatable one. The Ld. DR further submitted that the Assessing Officer disallowed Rs.3,53,75,223/- u/s 14A of the Act. The disallowance was confirmed by the

CIT(A). However, the ITAT directed the Assessing Officer to compute the disallowance u/s 14A read with Rule 8d. The assessee preferred appeal before the Hon'ble Delhi High Court and Hon'ble Delhi High Court relying upon the judgment in the case of Godrej & Boyce Manufacturing Ltd held that Rule 8D would be in applicable retrospectively and further directed the Assessing Officer to compute the disallowance on the basis of reasonable and irresponsible method of apportionment. The Ld. DR further submitted that the penalty proceedings were rightly initiated by the Assessing Officer. In fact, the assessee has not explained about why the penalty should not be imposed on the assessee. The Assessing Officer in penalty order has correctly observed that since the disallowance u/s 14A is statutory liability which was not involved by the assessee company. There is deliberate and conscious attempt on the part of the assessee to conceal/furnish inaccurate particulars of its true taxable income. Therefore, the appeal of the Revenue be allowed as per the submissions of the Ld. DR.

6. The Ld. AR relied upon the order of the CIT(A) and also perused the decision of the Hon'ble Apex Court in case of CIT Vs. M/s Essar Teleholdings Ltd. (ITA No. 2165/2012 dated 31.01.2018) and submitted that the CIT(A) rightly deleted the penalty.

7. We have heard both the parties and perused the material available on record. It is pertinent to observe that the main quantum appeal went up to the Hon'ble Delhi High Court and the CIT(A) has taken a proper cognizance of the decisions taken by the Hon'ble Jurisdictional High Court in case of CIT Vs. Liquidate Investment and Trading Company. (ITA No. 240/2009 order dated 5.10.201). The CIT(A) held as under:-

"I have considered the submissions of the assessee and facts of the case. I hereby find that the assessee has disclosed all material facts necessary for its assessment at the time of filing its return of income with department. The issue of deduction u/s 14A of the act was a debatable

issue. In this case the disallowance u/s 14A of the Act is on account of difference of opinion between the assessee and the revenue. In the facts of the case, we find that the difference of opinion with regard to calculation of deduction u/s 14A is an honest difference in opinion between the assessee and department. Further, I have placed reliance on the judgment of Hon'ble Delhi High Court in the case of Commissioner of Income Tax Vs Liquid Investment & Trading Company (ITA No. 240/2009) i.e, sister concern of the assessee, where penalty imposed u/s 271(1)(C) is hereby deleted by Hon'ble Jurisdictional High Court.

From the above findings after discussion, I am of the view that the penalty u/s 271(1)(C) of the Act cannot be levied on appreciating the facts of the case. Hence, the penalty of Rs.1,26,28,955/- levied u/s 271(1)(C) by AO is deleted.

In the result, the appeal is allowed.”

For the Assessment Year 2001-02 the similar penalty on the same issue was deleting. The relevant extract of the said order is as under:-

“21. A useful reference may also be made to the decision of Apex Court in the case of CIT v. Reliance Petro products Private Limited: 322 ITR 158, where the decision of Bombay High Court deleting the penalty imposed by the assessing officer on the ground that quantum appeal was admitted by the High Court on the ground of involving question of law, was affirmed by the Apex Court. And we take note that various other Hon'ble High Courts and Tribunals have decided the aforesaid issue in favor of the assessee. We take note of the fact that other High Courts and various benches of Tribunal in the following cases have decided the aforesaid issue in favour of the assessee and held that section 14A cannot be invoked where shares are held as stock-in-trade:

- CCI Ltd. v. JCIT: 250 CTR (Kar.) [Refer pg. 90 to 92 of Case Laws PB1*
- CIT vs. Smt. Leena Ramachandran: 339 ITR 296 (Ker.) [Refer pg 94-96 of Case Laws PBI*

- *DCIT v. M/s. India Advantage: ITA No. 671/Mum/ 2011 (Mum. Trib.)-*
- *Subsequently affirmed by the Bombay High Court in ITA No. 1131 of 2013 [Copy of the decisions attached herewith]*
- *Prescient Securities Pvt. Ltd. vs. ACIT: ITA No. 8361/Mum/2011 (Mum Trib.) [Refer Page 97-101 of Case Laws PBI]*
- *Yatish Trading v. ACIT: 129 HD 237 (Mum. Trib.)*
- *DCIT vs. Gulshan Investment Co Ltd.: ITA No. 666/Koll2012 (Kol.) [Refer Pgs 102- 108 of Case Laws PBI]*
- *Apoorva Patni v. ACIT: 54 SOT 9 (Pune Trib.)*
- *MSA Securities Services P. Ltd. v. ACIT: 22 ITR (T) 400 (Mad. Trib.)*
- *Ethio Plastics Pvt. Ltd. v. DCIT: ITA No. 8481 Ahdl2012 (Ahd. Trib.)*

From the aforesaid decisions cited, it is clear that the present issue, viz., application of section 14A, especially in relation to shares held as trading assets, was clearly debatable and so it cannot be visited with penalty under section 271(l)(c) of the Act.

22. *Further, we rely on the following decisions where penalty under section 271(l)(c) has been deleted on the issue of disallowance u/s 14A on the ground that the said issue is clearly debatable, which cannot be visited with penalty under the former section :-*

- *CIT v. Jindal Equipment Leasing and Consultancy Services Ltd. ITA NO. 68/2012 (Del) (HC) (Refer pages 43-46 of Case Laws PB)*
- *CIT v. Liquid Investments Ltd. ITA No. 2401/2009 (Del) (HC) (Refer pages 47 of Case Laws PB)*

- DCIT v. Nalwa Investment Ltd. ITA No. 3805/2010(Del) (ITAT) (Refer pages 48-59 of Case Laws PB)
- ACIT v. A.T. Invofin India (P) Ltd. ITA No. 4479/2013

23. *Further we find that the assessee has furnished all the details relating to the earning of dividend income. So it cannot be said that the assessee had concealed income or furnished inaccurate particulars of income. The only basis of levying the penalty u/s 271(1) (c) of the Act was that the claim of the assessee for the disallowance u/s 14A of the Act was not accepted by the AO, so it can at the most be a ground for making the addition but was not sufficient to levy the penalty u/s 271(l)(c) of the Act. So we find merit in the appeal of the assessee and direct deletion of penalty levied against the assessee. We order accordingly.*

24. *In the result the appeal of the assessee is allowed.”*

9. Thus, the assessee's case is governed by the Jurisdictional High Court as well as its own earlier order passed by the Tribunal. There is no need to interfere with the order of the CIT(A). The appeal of the Revenue is dismissed.

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

Order pronounced in the Open Court on 27th FEBRUARY, 2019.

Sd/-

(N. K. SAINI)
ACCOUNTANT MEMBER

Dated: 27/02/2018
R. Naheed *

Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI

| | | Date | |
|-----|--|------------|-------|
| 1. | Draft dictated on | 23/02/2018 | PS |
| 2. | Draft placed before author | 26/02/2018 | PS |
| 3. | Draft proposed & placed before the second member | .2017 | JM/AM |
| 4. | Draft discussed/approved by Second Member. | | JM/AM |
| 5. | Approved Draft comes to the Sr.PS/PS | .1.03.2018 | PS/PS |
| 6. | Kept for pronouncement on | | PS |
| 7. | File sent to the Bench Clerk | 01.03.2018 | PS |
| 8. | Date on which file goes to the AR | | |
| 9. | Date on which file goes to the Head Clerk. | | |
| 10. | Date of dispatch of Order. | | |

