

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "D", MUMBAI**

BEFORE SHRI SHAMIM YAHYA (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 163/MUM/2016
Assessment Year: 2011-12**

Dr. Devkishin Bherumal Pahlajani, Soona Villa, Flat No. 81/82, Perry Cross Road, Bandra (West), Mumbai - 400050 PAN: AACPP5413E	Vs.	The Asst. CIT 16(2), Aayakar Bhavan, 4 th Floor, Maharshi Karve Road, Mumbai - 400020
(Appellant)		(Respondent)

Assessee by : Shri P.V. Desai (AR)
Revenue by : Shri Ram Tiwari (Sr. DR)

Date of Hearing: 11/01/2018
Date of Pronouncement: 28/02/2018

ORDER

PER RAM LAL NEGI, JM

This appeal has been preferred by the assessee against the order dated 27.10.2015 passed by the Commissioner of Income Tax (Appeals)-5, Mumbai, for the assessment year 2011-12, whereby the Ld. CIT (A) has dismissed the appeal filed by the assessee against assessment order passed u/s 143 (3) of the Income Tax Act, 1961 (for short 'the Act').

2. The brief facts of the case are that the assessee, a Doctor by profession, filed its return of income for the assessment year under consideration declaring the total income of Rs.7,16,53,310/-. The return was processed under section 143(1) of the Act. Since, the return was selected for scrutiny notices under section 143(2) and 142(1) were issued. In response thereof the authorised representative appeared before the AO from time to time and also furnished the details called for. During the assessment year under consideration, the

assessee had declared profits and gains of profession, income from house property, capital gains and income from other sources.

3. Since, the assessee had claimed Rs.20,00,000/- as bad debt being irrecoverable loan, the assessee was asked to explain and establish the bad debt. The assessee contended that he had advanced loan of Rs. 20,00,000/- to Mr. J.V. Patni some years back on interest. However, the borrower did not return the money advanced to him and it is no longer possible to recover the said amount as he is untraceable and hence the amount has been written off and claimed against interest income. Alternatively, the same is a loss of capital and allowable as a capital loss against capital gains. The AO rejected the contention of the assessee and disallowed the claim of bad debt and added the same to the income of the assessee.

4. The assessee had also earned exempt income. Accordingly, he was asked to explain as to why disallowance under section 14A read with rule 8D of the income tax rules should not be made. The authorised representative of the assessee contended that the exempt income was earned from dividend and profit on sale of mutual funds. Both were earned in his personal capacity and form part of his personal income. No personal expenditure was claimed by him. His professional income and expenses are separate and distinct from personal income and expenses, which have been reflected in his capital account, therefore the provisions of section 14A of the Act are not applicable as none of the expenses of his profession relates to the exempt personal income. The AO rejected the contention of the assessee and worked out the disallowance under section 14A read with rule 8D at Rs 4,11,583/- on the basis of average value of investment. In the first appeal, the Ld. CIT(A) confirmed the action of AO and dismissed the appeal of the assessee.

5. Aggrieved by the impugned order passed by the Ld. CIT (Appeals), the assessee has preferred this appeal before the Tribunal on the following effective grounds:-

- 1.1 *“The Ld. CIT (A) erred in law and on facts in upholding the order of the Assessing Officer disallowing the loss of Rs. 20,00,000/- claimed by the Appellant against interest income earned by the Appellant.*
- 1.2 *The Ld. CIT (A) failed to appreciate that the loss of Rs. 20,00,000/- being loan written off as irrecoverable is allowable as a deduction u/s 57 of the I.T. Act, 1961 or alternatively as a capital loss against the capital gains earned by the Appellant.*
- 1.3 *The appellant prays that the claim of loss of Rs. 20,00,000/- be allowed u/s 57 of the I.T. Act, 1961 of the I.T. Act or as a capital loss against the capital gains earned by the Appellant.*
- 2.1 *The Ld. CIT (A) erred in law and on facts in upholding the order of the Assessing Officer disallowing a sum of Rs. 4,11,583/- u/s 14A on totally unjustifiable and untenable grounds.*
- 2.2 *The Ld. CIT (A) failed to appreciate that the Appellant had not claimed any expenditure relating to exempt income against taxable income and hence the disallowance was totally unjustified.*
- 2.3 *Without prejudice to the above, the Ld. CIT (A) also failed to appreciate that investment on which no exempt income has been earned cannot be considered for calculation of disallowance u/r 8D of the I.T. Rules, 1962.*
- 2.4 *The Appellant prays that the disallowance u/s 14A r.w.r. 8D be deleted or in the alternative the same be calculated correctly as per law.”*

6. The first issue relates to the bad debt claimed by the assessee. Before us the learned counsel submitted that the Ld. CIT(A) has wrongly confirmed the additions made by the AO. Placing reliance on the decision of 'D' Bench of the Delhi Tribunal, rendered in *ACIT vs. Living Media India Ltd.*, [2015] SOT 536, the Ld counsel submitted that after 01.04.1989, it is not necessary for the assessee to establish that the debt has become irrecoverable and it is enough if bad debts is written off as irrecoverable in books of account of the assessee. The Ld. counsel further submitted that as per the decision of the Hon'ble Delhi High Court rendered in *Mohan Meaken Ltd vs. CIT 348 ITR 109 (Delhi)*, the right of the assessee to relief is not restricted to the pleas raised by him before the departmental appeals before the tribunal. If in respect of the contentions raised by the assessee, grant of relief to him on another ground is justified, it would be open to the departmental authorities and the tribunal to grant that relief.

7. The second ground of appeal pertains to disallowance of Rs 4,11,583/-under section 14A of the Act. The learned counsel for the assessee submitted that the impugned order is bad in law as the AO has made the disallowance without examining the nature of expenses and ascertaining as to whether any expenditure would be held to be attributable for earning exempt income. The Ld. counsel relied on the decision of the Mumbai Tribunal rendered in *Swapan Murarka vs. ACIT*, [2015] 154 ITD 269/58 taxmann.com 369 (Mumbai-Trib.), Decision of Bangalore Tribunal in the case of *DCIT vs. Microlabs Ltd.* [2015] 70 SOT 774/62 taxmann.com 60 (Bangalore- Ttrib.) is support of his contention. The learned counsel further submitted that since, the AO has made the disallowance in a mechanical manner, the Ld. CIT(A) ought to have deleted the same.

8. On the other hand, the Ld. departmental representative (DR) relying on the order passed by the Lerner CIT(A) submitted that the findings of the Ld. CIT(A) on both the issues are in accordance with the evidence on record. Therefore, there is no merit in the appeal of the assessee.

9. We have heard the rival submissions and also perused the material on record. So far as the first issue is concerned, we notice that the assessee has not taken the plea that it is not necessary for the assessee to establish that has become irrevocable and it is enough if bad debt is written off as irrecoverable in the accounts of the assessee. We further noticed that the 'D' Bench of the ITAT Delhi has decided this issue in favour of the assessee following the ratio laid down by the *Hon'ble Supreme Court in the case of T.R.F. Ltd vs. CIT, 323 ITR 397* in which it has been held that after April 1, 1989, it is not necessary for the assessee to establish that the that in debt has become irrecoverable. It is enough if the bad debt is written off as irrevocable in the accounts of the assessee. Although, the assessee has not raised this point before the authorities below, yet as per the decision of Hon'ble Delhi High Court rendered in *Mohan Meakin Ltd vs. CIT (supra)*, the assessee is entitled to raise the plea before the departmental authorities and the tribunal even if the same has not been raised before the authorities below, if the plea is justified. In the present case the assessee has not raised this plea before the authorities below and has raised before us for the first time. Since, this issue is covered by the order of the Hon'ble Delhi High Court, we set aside the findings of the Ld. CIT(A) and restore this issue to the file of the AO for deciding the issue afresh. We therefore direct the AO to decide the issue afresh after hearing the assessee in the light the case relied upon by the assessee before the Tribunal.

10. The second issue pertains to disallowance under section 14A read with rule 8D of the Act. We notice that the coordinate Bench in the case of *Swapan Murarka vs. ACIT* (supra) restored the similar issue to the AO with the direction to examine nature of expenses and ascertain as to whether any expenditure could be held to be attributable for earning exempt income or not. As per the section 14A of the Act, disallowance under section 14A requires finding of expenditure and where it is found that for earning exempt income no expenditure has been incurred, disallowance under section 14A cannot stand. Similarly the 'A' Bench of the Bangalore ITAT has restored the similar issue to the assessing officer for pressed consideration in which the assessing officer had disallowed certain amount as other expenses under rule 8D (2)(iii) without rejecting claim of the assessee regarding said expenses. In view of the aforesaid findings of the various Benches of the ITAT, discussed above, we are of the considered view that this issue is requires fresh examination by the AO in the light of the cases discussed above. Accordingly, we set aside the order of the Ld. CIT(A) and send the issue back to the AO to decide the issue in accordance with the decision of the ITAT discussed above.

In the result, appeal filed by the assessee for assessment year 2011-2012 is allowed for the statistical purposes.

Order pronounced in the open court on 28th February, 2018.

Sd/-

(SHAMIM YAHYA)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 28/02/2018

Sd/-

(RAM LAL NEGI)

JUDICIAL MEMBER

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**