

आयकर अपीलिय अधीकरण, न्यायपीठ – “D” कोलकाता,
*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH “D” KOLKATA*

Before **Shri N.V.Vasudevan, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.182/Kol/2017
Assessment Year :2010-11

Kishan Gopal Mohta 7, Lyons Range, 2 nd Floor, Room No. 2A, Kolkata-001 [PAN No.ADQPM 0469 E]	V/s.	ACIT, Circle-35, Aayakar Bhawan, P-7, Chowringhee Square, Kolkata-69
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri P.J. Bhide, FCA
प्रत्यर्थी की ओर से/By Respondent	Shri G. Hangshing, CIT-DR
सुनवाई की तारीख/Date of Hearing	01-03-2018
घोषणा की तारीख/Date of Pronouncement	27-04-2018

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-10, Kolkata dated 04.04.2016. Assessment was framed by ACIT, Circle-35, Kolkata u/s 263/154/143(3) of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) vide his order dated 26.02.2016 for assessment year 2010-11 and assessee has raised following grounds:-

- “1. That on the facts and circumstances of the case as well as in law, the Ld. Commissioner of Income tax (Appeals), erred in holding that the Assessing Officer was justified in invoking the provision of section 14A of the Act.*
- 2. That on the facts and circumstances of the case, the Ld. Commissioner of Income tax (Appeals), Kolkata erred in confirming the disallowance of Rs.94,89,504/- made by the Assessing Officer u/s. 14A of the Act.*
- 3. That on the facts and circumstances of the case, the Ld. Commissioner of Income tax (Appeals), Kolkata, erred in holding that*

the Assessing Officer was justified in levying interest under sections 234A, 234B and 234C of the Act.

4. That the order passed by the authorities below is bad in law.

5. That the appellant craves leave to urge further grounds of appeal at the time of hearing.”

Shri P.J Bhide, Ld. Authorized Representative appeared on behalf of assessee and Shri G. Hangshng, Ld. Departmental Representative appeared on behalf of Revenue.

2. Before coming to the specific issue of the case in hand, it is better to understand the history of the facts of the case in brief.

3. The assessment was framed u/s 143(3) of the Act on 22.03.2013 at a total income of ₹2,82,39,620/- only after making certain additions/disallowances to the total income of assessee. Subsequently a rectification order u/s 154 of the Act was passed on 26.04.2013 determining the total income at ₹ 2,81,38,450/- only.

4. Again, the total income of assessee was revised to ₹2,82,39,620/- by rectifying the order u/s 154 of the Act vide dated 26.02.2016. In the meantime, Ld. CIT u/s 263 of the Act observing an error in the impugned order passed u/s 143(3) vide dated 22.03.2013 causing prejudice to the interest of Revenue. Accordingly, notice was issued upon assessee u/s 263 of the Act for revising the assessment order on account of non-deduction of expenses u/s 14A of the Act. Finally, order was revised by Ld. CIT u/s. 263 of the Act vide order dated 27.01.2015 by holding that the order of Assessing Officer is erroneous in so far as prejudicial to the interest of Revenue. Accordingly, AO was directed to pass the order afresh after carrying out the necessary investigation with regard to disallowance of the expense in relation to exempt income. The AO in consequence to the direction issued by Ld. CIT(A) u/s. 263 of the Act modified the assessment order by adding a sum of ₹94,89,504/- u/s. 14A of the Act.

5. Aggrieved, assessee preferred an appeal before Ld. CIT(A) who confirmed the order of AO vide order dated 28.11.2016. The assessee against the revision order passed u/s. 263 of the Act preferred an appeal before

Hon'ble Tribunal in ITA No.310/Kol/2015 wherein it was held that there was no error in the order passed by AO. Accordingly, impugned order passed by Ld. CIT u/s 263 of the Act was held unsustainable by the Tribunal vide order dated 03.01.2018. In this regard, Ld. AR before us submitted that the impugned order passed in consequence to the direction issued u/s 263 of the Act by the AO has no leg to stand. Therefore, such impugned order become infructuous / *non est* in the eyes of law. Thus, it was pleaded by Ld. AR that the appeal filed against the order of Ld. CIT-A becomes infructuous. On the other hand, Ld. DR vehemently relied on the order of Authorities Below.

6. We have heard the rival contentions of both the parties and perused the material available on record. In the instant case, there is no ambiguity that the impugned order passed by Ld. CIT u/s. 263 of the Act in the case of assessee was quashed in ITA No.310/Kol/2015 pertaining to assessment year 2010-11 order dated 03.01.2017. The relevant extract of the order is reproduced below:-

"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 2nd 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 (SC). Accordingly, the grounds raised by the assessee for the assessment year 2010-11 are allowed."

From the above proposition there remains no doubt that the impugned order passed by Ld. CIT u/s. 263 of the Act is not sustainable. Therefore, the order passed in consequent to direction issued u/s. 263 of the Act becomes infructuous. Hence, we reverse the order of Authorities Below on the ground that the consequential order passed u/s 263/154/154/143(3) of the Act is not maintainable and become infructuous. Thus the addition made by the AO and sustained by the Id. CIT-A are not sustainable. Thus we decide the issue in favour of assessee.

7. In the result, assessee's appeal stands allowed.

Order pronounced in the open court 27/04/2018

Sd/-

(न्यायिक सदस्य)

(N.V.Vasudevan)

(Judicial Member)

Kolkata,

*Dkp, Sr.P.S

दिनांक:- 27/04/2018 कोलकाता ।

Sd/-

(लेखा सदस्य)

(Waseem Ahmed)

(Accountant Member)

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-Kishan Gopal Mohta, 7 Lyons Range, 2nd Fl, Room No.2A,Kolkata-001
2. प्रत्यर्थी/Respondent-ACIT, Circle-35, Aayakar Bhawan, P-7 Chowringhee Sq. Kolkata-69
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

Sr. Private Secretary, Head of
Office/DDO

आयकर अपीलीय अधिकरण,

कोलकाता ।