

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "H", MUMBAI**

**BEFORE SHRI C.N PRASAD, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER**

**ITA No.3988/M/2016
Assessment Year: 2010-11**

ACIT 24(2), R.No.402, Piramal Chambers, 6 th Floor, Parel, Mumbai - 12	Vs.	Mrs. Mita D. Shah, 31-B, 1 st Floor, Laxmi Estate, Azad Road, Andheri (E), Mumbai- 400 069 PAN: AFBPS1012A
(Appellant)		(Respondent)

**CO No.51/M/2018
Assessment Year: 2010-11**

Mrs. Mita D. Shah, 31-B, 1 st Floor, Laxmi Estate, Azad Road, Andheri (E), Mumbai- 400 069 PAN: AFBPS1012A	Vs.	ACIT 24(2), R.No.402, Piramal Chambers, 6 th Floor, Parel, Mumbai - 400012
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Rajan R. Vora, A.R. &
Shri Nikhil Tiwari, A.R.

Revenue by : Ms. Pooja Swaroop, D.R.

Date of Hearing : 08.03.2018

Date of Pronouncement : 15.05.2018

ORDER

Per Rajesh Kumar, Accountant Member:

The above titled appeal by the Revenue and the cross objection by the assessee have been preferred against the order dated 31.03.2016 of the Commissioner of Income Tax

(Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2010-11.

2. The only issue raised in various grounds of appeal of the Revenue is against the direction of Ld. CIT(A) to AO to treat the long term as well as short term capital gain amounting to Rs.18,95,000/- as such and not as business income.

3. The facts in brief are that during the year the assessee has earned long term capital gain of Rs.89,95,728/- comprising Rs.41,23,584/- as short term capital gain and Rs.48,72,144/- on account of long term capital gain on the sale and purchase of shares undertaken as an investor and not as a trader whereas as per the AO, looking to the frequency of transactions, period of holding and other facts and circumstances, the assessee was doing the business and accordingly the AO treated the said amount of gain as business income while framing the assessment.

4. In the appellate proceedings, the Ld. CIT(A) deleted the disallowance by observing that even in the past, Revenue has accepted the assessee as investor and therefore came to the conclusion that assessee is an investor and not a trader. Ld. CIT(A) further relied on the order of his predecessor in the case of Shri Dipak K. Shah the husband of the assessee in which Ld. CIT(A)-39 for A.Y. 2010-11 who decided the issue under identical facts and circumstances in favour holding the assessee to be investor and not as trader in shares.

5. The Ld. D.R. strongly submitted before the Bench that in the instant case the assessee has shown substantial income by way of surplus on sale and purchase of shares as long term as well as short term capital whereas if the totality of the transactions and intention of the assessee are looked into, it is quite apparent that the assessee has indulged in the business of shares trading and thus AO rightly treated the gain on sale of shares as income from business.

6. Ld. A.R., on the other hand, submitted that the assessee is a long term investor in the shares and has even utilised his own funds for the purpose of investments and no funds were borrowed for financing the purchase of shares and securities. The Ld. A.R. also referred to the CBDT circular No.06/2016(F. No.225/12/2016-ITA-II) dated 29.2.2016 a copy of which is filed at page No.129 of the paper book wherein the attention of the Bench was drawn to para 3(b) wherein the CBDT issued a circular to AO to treat the income from transfer of shares held for more than 12 months as long term capital gain if the assessee chooses so. The Ld. A.R. referred to another circular No.4/2007 dated 15.06.2007 filed at page 130 of the paper book to emphasize the point that assessee can be a trader as well as an investor simultaneously and may have two portfolios in which the assessee can hold the shares, securities as capital assets as well as stock in trade in the trading segment. The Ld. A.R. submitted that assessee has maintained two portfolios and reported the income under both the heads of income i.e. income from business and profession and income under the head capital gain by referring to page No.37

wherein the comparative details from A.Y. 2004-05 to A.Y. 2015-16 are tabulated. The Ld. A.R. further submitted that the issue is squarely covered in favour of the assessee by the decision of the co-ordinate bench of the Tribunal in the case of the husband of the assessee wherein the Tribunal, in ITA No.3661/M/2015 for A.Y. 2010-11 vide order dated 12.04.17, has decided the issue under identical facts in favour of the assessee by dismissing the appeal of the Revenue. The Ld. A.R. submitted that following the decision of the co-ordinate bench of the Tribunal the appeal of the Revenue should be dismissed.

7. We have heard the rival submissions of both the parties and perused the material on record including the impugned order. The undisputed facts are that the assessee is maintaining two portfolios i.e. investment as well as trading. In the investment portfolio the shares are held as investments whereas in the trading portfolio the shares and securities are held as stock in trade. The assessee has duly classified the same in the shares into investment portfolio and trading segment. We also note that the assessee has used her own funds and no funds were used for the purpose of investments. Therefore, looking to the facts and circumstances of the case in totality, we do not find any defect or infirmity in the order of Ld. CIT(A). Moreover, the case of the assessee is squarely covered by the decision of the co-ordinate bench of the Tribunal in ITA No.3661/M/2015 for A.Y. 2010-11 and others. The relevant paras of the said order are reproduced as under:

“18. To sum up, we find the view of the AO in treating the LTCG and STCG as business income of the assessee, is not proper. Considering

statutory provisions regarding the definition of LTCG, we are convinced that the views of CIT (A) are sustainable. Similarly, regarding the claim of STCG also, we find that (i) the consistency principles; (ii) use of own funds of Rs. 54 Crs; (iii) earning of gross dividend income of Rs. 1.20 Crs or Rs. 30 lakhs on account of short term capital assets; iv) details given in the contract notes regarding intention of certain shares in physical form etc., suggest that the STCG in question cannot be held as business income.

19. Therefore, in our opinion, the decision of the CIT (A) on this issue is fair and reasonable and does not call for any interference. Accordingly, grounds raised by Revenue with regard to both the STCG and LTCG are dismissed.

20. In the result, appeal of the Revenue is dismissed.”

8. After perusing the above order of the co-ordinate bench of the Tribunal vis-à-vis facts of the assessee's case, we find that the facts in the said case are same as involved in the present case before us. Therefore, following the above order of the Tribunal we affirm the order of Ld. CIT(A) by dismissing the appeal of the revenue.

9. In the result appeal of the Revenue is dismissed.

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10. The various issues raised by the assessee are reproduced below:

“On the facts and in the circumstances of the case the learned AO/CIT(A) -

1. erred in making a disallowance of As. 6,28,793/- under section 14A r.w.r 8D(iii);
2. failed to appreciate the fact that the assessee has not incurred any expenditure to earn the exempt income and AO has made an adjustment without recording any satisfaction with regards to the correctness of claim of assessee;
3. **Without prejudice to the above**, disallowance if any, under section 14A of the Act shall be restricted to 2% of the exempt income earned;
4. **Without prejudice to the above**, disallowance under section 14A of the Act read with Rule 8D(iii) of the Rules, if any, should be restricted to 0.5% of average value of investments, by only considering those investments from which dividend is received during the year;

5. **Without prejudice to the above**, erred in not excluding the short term investments, gains from which are taxable; while computing disallowance under section 14A r.w.r 8D;

6. erred in upholding interest under section 234C of the Act amounting to Rs. 10,113 treating it as consequential in nature;

7. In addition to above, the AO erred in not accepting the CIT(A)'s order and has filed an appeal before Income Tax Appellate Tribunal;

11. The issue raised in cross objection No.1 is against the addition of Rs.6,29,793/- under section 14A read with rule 8D(iii) which was confirmed by the Ld. CIT(A).

12. The facts in brief are that the AO, during the course of assessment proceedings, noted that assessee has not attributed and apportioned any expenses towards the earning of exempt income while observing that no direct expenses and interest expenses were claimed by the assessee in the P & L account. The Ld. CIT(A) also upheld the decision of disallowance of Rs.6,29,793/- as made by the AO by invoking section 14A read with rule 8D(iii) by observing that the rules were rightly invoked by the AO as how can there be any income without expenses. The Ld. A.R. vehemently submitted before us that during the year the assessee has not incurred any expenditure by referring to the P & L account which is filed at page No.42 of the paper book. The expenses claimed in the P & L account were only to the tune of Rs.2,22,354/- comprising miscellaneous expenses Rs.60,000/-, conveyance and travelling expenses Rs.40,000/-, bank charges Rs.1,645/- and membership and subscription Rs.1,20,700/-. The Ld. A.R. submitted that there is no expenses incurred in earning the exempt income and therefore disallowance of Rs.6,28,793/-

under section 14A r.w.r. 8D when the assessee has incurred and charged the expenses in the P & L account only to the tune of Rs.2,24,354/-. The Ld. A.R. submitted that in order to disallow the expenses relating to earning of exempt income the AO first has to record his satisfaction and then work out the disallowance but nothing of the sort was done by the AO before invoking the provisions of section 14A r.w.r. 8D. Therefore, the disallowance should be deleted. Without prejudice, the Ld. A.R. alternatively submitted that in the case of assessee's husband in ITA No.3661/M/2015 for A.Y. 2010-11 (supra) the co-ordinate bench of the Tribunal has made the disallowance at the rate of 2% and the same should be applied in the present case as well.

13. The Ld. D.R., on the other hand, objected to the arguments of the Ld. A.R. and relied heavily on the order of authorities below on this issue.

14. We have heard the rival submissions of both the parties and perused the material on record. We find that in this case a disallowance of Rs.6,29,793/- was made by the AO and was also sustained by the Ld. CIT(A) also justifying the invocation of provision of section 14A read with rule 8D(iii) on the ground that it was not possible to make any income without expenses thereby ignoring the facts that the expenses claimed by the assessee in the P & L account are only to the extent of Rs.2,24,354/-. Therefore, the arguments of the Ld. A.R. that disallowance cannot exceed actual expenses claimed by the assessee appear to be correct. Moreover from the perusal of

the order of co-ordinate bench of the Tribunal, we find that in the identical facts, the co-ordinate bench of the Tribunal has directed the disallowance @ 2% of the exempt income. But keeping in view the nature of business and facts of the case, we are of the view that disallowance of expenses attributable to earning of exempt income has to be based upon the quantum of expenses incurred by the assessee. We, therefore, deem it fit and reasonable to direct a disallowance @ 20% of total expenses i.e. Rs.2,24,354/- as expenses attributable to earning of exempt income under Rule 81D(2)(iii) of the Rules.

15. In the result appeal of the Revenue is dismissed and the cross objection of the assessee is partly allowed.

Order pronounced in the open court on 15.05.2018.

**Sd/-
(C.N Prasad)
JUDICIAL MEMBER**

**Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER**

Mumbai, Dated: 15.05.2018.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.