IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "G", MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA No.5419/M/2016
Assessment Year: 2012-13

Mr. Mahendra Vichare, 701/702, Gaurav Heights, Mahavir Nagar, Near New Link Road, Kandivali West, Mumbai – 400 067 **PAN: AASPV 0396A**	Vs.	Dy. Commissioner of Income Tax 13(3)(2), Aayakar Bhavan, Mumbai
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Mayur Kisnadwala, A.R.
Revenue by : Shri V. Vidhyadhar, D.R.

Date of Hearing : 10.04.2018
Date of Pronouncement : 17.05.2018

O R D E R

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the assessee against the order dated 20.06.2016 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2012-13.

2. The various grounds raised by the assessee are as under:

"1. The learned Commissioner of Income Tax (Appeals) erred in facts and in law by confirming the addition amounting to Rs.5,41 262/- by assuming the Annual Letting out Values of properties @8% when the said properties were used for the commercial purposes.

2. The learned Commissioner of Income tax (Appeals) also erred in facts and in law by confirming a disallowance of Rs.1,58,123/- under section 14A of the Act when it should not have been done so as the conditions for.

3. The learned Commissioner of Income tax (Appeals) further erred in facts and in law by stating that rectification order was passed for rectifying the error for computing the tax on short term capital gains @ 30% in place of 15% where no such rectification was made, which could have been considered to direct the assessing officer to do so.

4. The appellant craves to add, alter, amplify, modify and vary the grounds of appeal."

3. We would like to mention at the outset that the Ld. Counsel of the assessee did not press ground No.3 during the course of hearing and accordingly the same is dismissed as not pressed.

4. The issue raised in ground No.1 is against the confirmation of addition of Rs.5,41,262/- as made by the AO by taking the annual letting value of the property at 8% of the value of the properties as recorded in the balance sheet.

5. The facts in brief are that AO, during the course of assessment proceedings, noted that the assessee has 9 house properties the value whereof as recorded in the balance sheet was Rs.1,13,42,359/-. The details of these properties are given by the AO on page No.7 of the assessment order whereas the assessee has not offered any income from the house property. Accordingly, show cause notice was issued to the assessee vide order sheet entry dated 7.11.2014 which was replied by the assessee on 10.11.2011 submitting to the AO that flat no.701 & 702, Gaurav Heights were self occupied and all other properties except the house at native place Talwade were commercial properties fetching no rent and therefore not offered to tax. The assessee also submitted that all these properties were used for the business of the assessee

and not for the earning of rental income and therefore same cannot be assessed by estimating the ALV. The AO brushed aside the contention of the assessee and determined the ALV at 8% of Rs.96,65,399/- which was calculated by taking the total cost of the properties Rs.1,13,42,359/- minus the cost of self occupied flats of Rs.16,76,960/- and after allowing a deduction of 30% under section 24 of the Act in respect of repairs , the resulting amount Rs.5,41,262/- was added under the head income from house property.

6. In the appellate proceedings, the Ld. CIT(A) also dismissed the appeal of the assessee by observing and holding as under:

> "4.4 I have considered the submission of the appellant carefully. It is noted that the appellant and the companies listed as user of the properties are different legal entities. The properties in question are owned by the Appellant. The same has not been transferred to the companies in lieu of share capital. The transaction between the share holders and the company is between two different legal entities. The business of the Companies in which the appellant is shareholder promoters is not the business of the appellant. I therefore find no merit in the contention of the Appellant and the **Grounds of Appeal No.1 is therefore dismissed."**

7. The Ld. CIT(A) dismissed the appeal of the assessee by observing that all these properties are being used by the companies which are separate legal entities though the assessee is a shareholder holding majority of the shares of the said companies and running business himself through these companies. The assessee is also director of the said companies.

8. The Ld. A.R. argued before us that all these premises in respect of which the ALV has been estimated @ 8% of the

cost/investment in the said properties as appearing in the balance sheet were being used by the companies in which the assessee is a promoter shareholder and holds majority of the shares and the business is being run by the assessee through these companies from these commercial premises. Therefore no ALV can be estimated as done by the AO and affirmed by the CIT(A). The Ld. A.R. contended that the order of Ld. CIT(A) upholding the order of AO is wrong and deserved to be reversed. The Ld. A.R. relied on the decision of Hon'ble Madras High Court in the case of CIT vs. K.M. Jagannathan (1989) 180 ITR 191. Alternatively, the Ld. A.R. further contended that though the premises were used by the private limited companies which are distinct from the assessee. The undisputed facts are that the majority stocks in the said companies were held by the assessee and assessee is a promoter director in the said companies. The Ld. A.R. also contended that in absence of any rent receipts, the municipal value has to be treated as annual value of those properties. In defense of his argument, the Ld. A.R. relied on the decision of co-ordinate bench of the Tribunal in the case of Veena D. Munganahalli vs. ITO in ITA No.2516/M/2012 for A.Y. 2009-10 and another decision in the case of Deepak Sanghvi vs. ITO in ITA No.6215/M/2013 for A.Y. 2009-10 wherein it has been held that ALV of the property should be determined as per municipal valuation where there is no rent receipt. The Ld. A.R. submitted that this ratio is squarely applicable to the case of the assessee as in this case also the assessee is

carrying on the business through his companies and the premises were not let out.

9. The Ld. D.R., on the other hand, relied on the order of authorities below and submitted that the premises were used for the purpose of carrying on the business by the private limited companies in which the assessee is admittedly a promoter director and holding the majority of the shares and were independent and distinct entities from the assessee and were carrying on business in their own capacity which cannot be considered as tantamounting to assessee doing the business. Therefore, the order of Ld. CIT(A) is correct and deserved to be affirmed on this issue.

10. We have heard the rival submissions of both the parties and perused the material on record including the decisions cited by the Ld. A.R. The undisputed facts are that the assessee has 9 properties out of which flat No.701 & 702 at Gaurav Heights are self occupied whereas the property a residential house at native place Talwadi is inherited by the assessee in which he has 50% share which is also self occupied and the remaining 7 properties are being used for the purpose of business by the private limited companies promoted by the assessee from which no rent is being received. We do not find merit in the contention of the assessee that where the property is used for the business purpose through the private limited companies promoted by him has to be construed as the assessee is carrying on business for the reason that companies as promoted by the

assessee are separate legal entities and assessee can not be said to have carried on business through these entities. In the decision of the Hon'ble Madras High Court in the case of CIT vs. K.M. Jagannathan (supra) in which it has been held that where business is carried on by the firm should be regarded as being carried on by all the partners and no property income should be computed in respect of portion of the property occupied by the firm of which assessee is a partner whereas in the present case the business is carried on by the private companies and therefore distinguishable. However, alternative contention of the assessee has merit that in absence of any rent receipt by the assessee the ALV can not be assessed by applying 8% on the investment value but has to be assessed on the basis of Annual Rateable Value by MC. The case of the assessee is supported by the decisions of the coordinate benches namely Veena D. Munganahalli vs. ITO and Deepak Sanghvi vs. ITO (supra). Considering all these facts and decisions of the co-ordinate benches, we restore the issue to the file of AO to decide that ALV on the basis of Annual Rateable Value by MC. The ground is allowed for statistical purposes.

11. The issue raised in ground No.2 is against the confirmation of disallowance of Rs.1,58,123/- by Ld. CIT(A) as made by the AO under section 14A of the Act.

12. The facts in brief are that during the assessment proceedings AO observed that assessee has exempt income to the tune of Rs.72,72,849/- comprising long term capital gain

on sale of shares, profit from partnership firm, interest on PPF and dividend. However, no corresponding disallowance of expenditure relatable earning of exempt income was made in accordance with section 14A of the Act read with rule 8D of the Rules and therefore issued show cause notice to the assessee which was replied by the assessee by submitting that no expenses were incurred in order to earn the exempt income. It was also submitted that no notional expenditure can be appropriated for the purpose of exempt income unless and until there is an actual expenditure in relation to earning of such income. However, the contention of the assessee did not find favour with the AO and he finally applied rule 8D and added a sum of Rs.1,58,123/-. The order of the AO is also affirmed by the first appellate authority by observing that a significant amount of income was earned by the assessee during the year which is exempt and the AO is justified in applying the rule 8D(2)(iii) to make the disallowance and accordingly upheld the addition of Rs.1,58,123/-.

13. After hearing the rival submissions of the parties and perusing the material on record, we find that the assessee has earned exempt income by way of long term capital gain on sale of shares, profit from partnership concern, interest on PPF and dividend aggregating to Rs.72,72,849/-. However, after perusal of statement of total income which was filed during the course of hearing, we observe that the assessee has not incurred and claimed any expenses except bank charges of Rs.125/- and thus the arguments of the assessee seem to be

correct that in absence of any actual expenditure on earning the exempt income, the provisions of rule 8D(iii) are not applicable. In our opinion, the disallowance under section 14A read with rule 8D can only be made where the assessee has incurred expenses and not otherwise. In this case, the AO has made disallowance by applying the provision of rule 8D(iii) towards administration expenses which is not correct and has to be deleted as assessee has not incurred any expenses. The case of the assessee is squarely covered by the decision of the co-ordinate bench of the Tribunal in the case of Justice Sam P. Bharucha vs. ACIT (2012) 25 taxmann.com 381 (Mum.) wherein it has been held that the apportionment of expenditure is only applicable where the assessee has incurred composite/indivisible expenses in respect of taxable and non taxable income and where it is not possible to determine the actual expenditure in relation to the exempt income or when no expenditure has been incurred in relation to exempt income, then principle of apportionment embedded in section 14A has no application. Following the decision of the co-ordinate bench of the Tribunal, we allow the ground raised by the assessee.

14. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 17.05.2018.

Sd/-	**Sd/-**
(Saktijit Dey)	**(Rajesh Kumar)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dated: 17.05.2018.

* 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.