



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

**BEFORE SHRI R.C.SHARMA, AM**

**&**

**SHRI RAM LAL NEGI, JM**

**ITA No.6430/Mum/2016**

**(Assessment Year 2012-13:)**

|  |           |   |
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| DCIT 32(3)<br>R.No.108, 1 <sup>st</sup> Floor<br>C-11, Pratakshyakar Bhavan<br>BKC, Bandra<br>Mumbai-400 051 | Vs.       | Shri Pratap U. Purohit<br>307, Jalaram Business<br>Centre, Ganjawala Lane<br>Near Chamunda Circle<br>Borivali (W)<br>Mumbai – 400 068 |
| <b>PAN/GIR No.</b>   |           | <b>AHCPP6451F</b>   |
| <b>Appellant)</b>  | <b>..</b> | <b>Respondent)</b>  |

|                              |                     |
|------------------------------|---------------------|
| Revenue by                   | Shri Ashish K V     |
| Assessee by                  | Shri Sanjay Kapadia |
| <b>Date of Hearing</b>       | <b>11/06/2018</b>   |
| <b>Date of Pronouncement</b> | <b>20/06/2018</b>   |
|                              |                     |

**आदेश / ORDER**

**PER R.C.SHARMA (A.M):**

This is an appeal filed by the Revenue against the order of CIT(A)-44, Mumbai dated 22/08/2016 for the A.Y.2012-13 in the matter of order passed u/s.143(3) of the IT Act.

2. In this appeal, Revenue is aggrieved for deleting disallowance of Rs.4,69,669/- made u/s.14A r.w.Rule 8D of the IT Act.

3. The department is also aggrieved for deleting addition of Rs.62,20,000/- made by AO as estimation of income for use of liquid funds.
4. Rival contentions have been heard and record perused.
5. Facts in brief are that the assessee is engaged in the business of civil construction. There was a survey at the business premises. As a result of survey a disclosure of Rs 15.55 cr was made for AY 2012-13. The disclosure was made on the ground that the assessee had taken bogus bills of purchases. It was established as a result of survey that the assessee used to make payment for bogus purchases in cheque and used to get cash in lieu of such payments. The assessee on being confronted on evidence offered a sum of Rs 15.55 Cr as income from other sources which was over and above the profit arrived at from the transactions accounted for in the books of accounts. The assessee had stated in the statement recorded that the cash generated by him was utilized and deployed in his business. The AO took a view in the assessment order that the assessee must have earned further income on the cash amount of Rs 15.55 cr. The AO therefore estimated that the assessee must have, earned 4% of the cash receipts as additional income and accordingly added Rs 62,20,000/- to the total income of the assessee.
6. By the impugned order, CIT(A) deleted the addition after having the following observation:-

5.3 I have carefully gone through the assessment order as well as the written submission of the appellant. The first thing which strikes in the assessment order is that on this issue also the AO has not given any opportunity of explanation before making the addition. No show cause seems to have been given. There is no mention of assessee's explanation on this issue. The AO has not brought any material on record to suggest that apart from the regular income from business and the surrendered income under other sources the assessee has earned Rs 62,20,000/- It seems that the AO failed to understand that in addition to the additional income of Rs crores. the appellant has further computed business income amounting to Rs 4 crores and have filed returned income of Rs 19,56,32,830/-. As per income & expenditure a/c the assessee has shown gross profit of Rs 25.35% from his business. Thus the cash generated by way of inflation of purchase bills have been ploughed back into the fund flow and the business of the appellant in one way or the other. It is further seen that the total disclosure made by the appellant was Rs 20 crores out of which Rs 15.55 crores related to additional income under other sources for AY 12-13. The books of accounts of the appellant are audited. Intrusive enquiry in the form of survey u/s 133A was made in this case. So, there is no justification for making addition on the basis of estimation. After considering the totality of facts the grounds of appeal no, 3 is allowed and consequently addition of Rs 62,20,000/- is deleted.

6. Grounds of appeal No.4 is regarding initiation of penalty. Mere vitiation does not cause any prejudice to the assessee. If penalty is levied, then it is open for the assessee to contest the penalty order in appeal. Ground of appeal No.4 is accordingly dismissed. \_

7. The grounds of appeal no. 5 relates to charging of interest u/s 234B & 234C and is therefore consequential in nature. The AO is directed to recompute interest after giving appropriate appeal effect of this order.

8. The ground of appeal No.6 is general in nature and therefore does not require any comments.

9. In the result, the appeal **is partly allowed.**

7. Revenue is in further appeal before us.

8. We have considered rival contentions and carefully gone through the orders of the authorities below. From the record we found that the AO has made the impugned addition for the reason that assessee deployed

these funds in the ventures being undertaken by others. Therefore, the AO on hypothetical basis arrived at a conclusion that assessee might have earned 4% of the amount deployed. In this case survey was conducted at the office premises of the assessee. Pursuant to which diary and other details were found beyond the impugned diary the Department did not find anything else. When all the receipts or income entered into diary and the same are offered for taxation which the AO also accepted as correct, however, while completing the assessment AO further made addition on an a/c of presuming deployment of funds, whereas nowhere it is mentioned or entered as received or receivable. Moreover, in addition to disclosure of Rs,15.55 crs assessee made further disclosure ofRs.45 lacs to cover up any other discrepancy if any found during the course of assessment proceeding. Moreover, there was no evidence of any nature that assessee earned income in addition to whatever has not been offered in ROI filed and as offered pursuant to survey disclosure. The impugned estimation without any real income that too without any evidence is not substantiated.

9. Furthermore, the justification given by CIT(A) for having no basis for estimation of income is as per material on record which do not require any interference on our part. Accordingly, we confirm the action of CIT(A) on this issue.

10. During the course of assessment proceedings, it was noted by the AO that the assessee has earned exempted dividend income amounting

to Rs.44,821/-. It was further noted by the AO that the assessee has claimed payment of interest amounting to Rs 15,68,32,845/-The AO asked the assessee to explain as to why disallowance not be made under the provision of section 14A rwr 8D. It is the contention of the AO that the assessee did not provide any explanation for the same. The AO accordingly invoked the provision of rule 8D and computed the amount of disallowance u/s 14A at Rs 4,69,668/-. The same was added to the total income of the assessee.

10. By the impugned order, CIT(A) deleted the addition after observing as under:-

*4.3 I have carefully gone through the assessment order as well as the written submission of the appellant. It is seen from the perusal of the balance sheet of the assessee that the capital account of the appellant stood at Rs 28,16,25,530/- as on 31.03.2012. In the immediate preceding financial year, the capital account of the appellant stood at Rs 6,98,15,381/-On the other hand, the AO has mentioned in the assessment order that the average of investments which has given rise to exempt dividend income was Rs 52,55,500/-. Thus it seems inconceivable that borrowed fund will be required to make investment amounting to Rs 52,55,500/-. Further the relevant investments as on 31.03.2011 was Rs 44,47,000/- while the same as on 31.03.2012 was Rs 60,74,000/-. The fresh investment during the year which is related to earning of exempt dividend income is Rs. 16,37,000/-only.*

*4.4 It has been held by the Hon'ble jurisdictional Bombay High Court in the case of CIT Vs Reliance Utilities and Power Ltd. 313 ITR 340 that if there are interest free funds available then a presumption would arise that investments would be put of such interest free funds provided such funds are sufficient to meet investments. Following this judgment, it has been held by the Hon'ble High Court in the case of CIT vs HDFC Bank Ltd. 366 ITR 505 that where assessee's own funds and other non-interest bearing funds were more than investment which has given rise*

*to exempt income no disallowance can be made under the provision of section 14A. The judgment cited above was again reaffirmed in the case of HDFC Bank Ltd. Vs DCIT (2016) 67 Taxmann.com 42. After considering the totality of facts and the position of law, I have come to a conclusion that disallowance u/s 14A r.w.r. 8D of the IT rules is not justified in this case. The grounds of appeal no.2 is accordingly allowed.*

11. Against this order of CIT(A), Revenue is in further appeal before us.

12. We have considered rival contentions and found from record that assessee was having sufficient interest free funds with it as per the documents placed on record. Applying the proposition of law laid down by Jurisdictional High Court in case of Reliance Utilities & Power Ltd., 313 ITR 320, if there are interest free funds available then a presumption would arise that investments would be put out of such interest free funds provided such funds are sufficient to meet investments. Applying these propositions to the facts of the case, where interest free funds were sufficiently available with the assessee, there is no justification for the disallowance made by AO u/s.14A amounting to Rs.4,69,669/-. Accordingly, we do not find any infirmity in the order of CIT(A) for deleting disallowance made u/s.14A.

**13. In the result, appeal of the Revenue is dismissed.**

Order pronounced in the open court on this / /2018

**(RAM LAL NEGI)**  
JUDICIAL MEMBER

**(R.C.SHARMA)**  
ACCOUNTANT MEMBER

Mumbai; Dated / /2018  
Karuna Sr.PS

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)  
**ITAT, Mumbai**