

**आयकर अपीलिय अधिकरण "C" न्यायपीठ मुंबई में।**

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

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री एन. के. प्रधान लेखा सदस्य के समक्ष ।

**BEFORE SRI MAHAVIR SINGH, JM AND SRI N.K. PRADHAN, AM**

आयकर अपील सं./ ITA No. 5545/Mum/2015

(निर्धारण वर्ष / Assessment Year 2010-11)

आयकर अपील सं./ ITA No. 5528/Mum/2015

(निर्धारण वर्ष / Assessment Year 2011-12)

Dy. Commissioner of Income Tax, (1)(1),  
579, Aayakar Bhawan, M.K. road,  
Mumbai-400 020

..... (अपीलार्थी / Appellant)

Vs.

Capri Global Advisory Services Pvt. Ltd  
(Earlier Known as my idea advisory services  
Ltd.)  
1-B, 1<sup>st</sup> Floor Court Chambers, New Marine  
Lines, Mumbai-400 020

..... (प्रत्यर्थी / Respondent)

स्थायी लेखा सं./PAN NO. AACCP2478C

अपीलार्थी की ओर से / Appellant by	:	Shri Abi Rama Karthikeyan, DR
प्रत्यर्थी की ओर से / Respondent by	:	Shri Mahesh Rajora, AR

सुनवाई की तारीख / Date of hearing:	20-08-2018
घोषणा की तारीख / Date of pronouncement :	20-08-2018

**आदेश / ORDER**

**PER MAHAVIR SINGH, JM:**

These appeals by the Revenue are arising out of the different orders of Commissioner of Income Tax (Appeals)-2, Mumbai [in short



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CIT(A)], in appeal Nos. CIT(A)-2/IT/388 & 60/2013-14 of even date 10.08.2015. The assessments were framed by the Dy. Commissioner of Income Tax, Circle 1(2), Mumbai (in short 'DCIT'/ 'AO') for the A.Yrs. 2010-11 & 2011-12 vide different orders dated 23-12-2013 & 15-03-2013 under section 143(3) of the Income Tax Act, 1961 (hereinafter 'the Act').

**In ITA No. 5545/Mum/2015 for AY 2010-11**

2. At the outset, the learned Counsel for the assessee stated that in this appeal of Revenue, Revenue has challenged the order of CIT(A) deleting the disallowance made by the AO amounting to ₹ 86,89,595/- on account of short term capital gain treating as business income and disallowance of expenses by invoking the provisions of section 14A r.w.r. 8D of the Rules, (hereinafter 'the Rules') amounting to ₹ 10,99,634/-. The learned Counsel for the assessee computed that the tax effect in this appeal is ₹ 18,50,562/-, which is below the prescribed limit for filing of appeal vide circular brought by the Central Board of Direct Taxes (CBDT) vide F.No. 279/Misc. 142/2007-ITJ (Pt) dated 11.07.2018, wherein monetary limits and other conditions for filing of departmental appeal has been revised and fixed at ₹ 20 lacs. He placed the copy of this circular on record. The learned Counsel for the assessee particularly drew our attention to the Para. 4 of this circular which reads as under: -

*"4. For this purpose, 'tax effect' means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of the issues against which appeal is intended to be filed (hereinafter referred to as 'disputed issues. Further, 'tax effect' shall be tax including applicable surcharge and cess. However, the tax will not*



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*include any interest thereon, except where chargeability of interest itself is in dispute. In case the chargeability of interest is the issue under dispute, the amount of interest shall be the tax effect. In cases where returned loss is reduced or assessed as income, the tax effect would include notional tax on disputed additions. In case of penalty orders, the tax effect will mean quantum of penalty deleted or reduced in the order to be appealed against.”*

3. The learned Counsel also stated that this circular will apply to pending appeals below the specify limit of ₹ 20 lacs which is filed before the Income Tax Appellate Tribunal. For this, he referred to Para 13 of the circular, which reads as under: -

*“13. This Circular will apply to SLPs/appeals/ cross objections/ references to be filed henceforth in SC/HCs/Tribunal and it shall also apply retrospectively to pending SLPs/ appeals/cross objections/ references. **Pending appeals below the specified tax limits in para 3 above may be withdrawn/ not pressed.**”*

4. In view of the above, the learned Counsel for the assessee stated that the Revenue’s appeal is fully covered by CBDT circular No. 3 of 2018 and there is no exception brought out by the Revenue that this appeal falls under any of the exception as provided in Para 10 which reads as under: -

*“10. Adverse judgments relating to the following issues should be contested on merits notwithstanding that the tax effect entailed is less*



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*than the monetary limits specified in para 3 above or there is no tax effect:*

*(a) Where the Constitutional validity of the provisions of an Act or Rule IS under challenge, or*

*(b) Where Board's order, Notification, Instruction or Circular has been held to be illegal or ultra vires, or*

*(c) Where Revenue Audit objection in the case has been accepted by the Department, or*

*(d) Where the addition relates to undisclosed foreign assets/ bank accounts.”*

5. The learned Counsel for the assessee stated that the tax effect on this quantum is ₹ 18,50,562/-. In view of this, the learned Counsel stated that the assessee's appeal is squarely covered by Board Circular No. 3 of 2018.

6. When this was confronted to the learned Sr. Departmental Representative, Shri Abi Rama Karthikeyan, he could not point out that this appeal falls under any of the exception as provided in Circular No. 3 of 2018. Admittedly, the tax effect is amounting to ₹ 18,50,562/- which is below the prescribed limit of filing appeal before the Tribunal i.e. ₹ 20 lacs as per CBDT circular No. 3 of 2018. In view of the above, we dismissed the appeal of Revenue as withdrawn in view of Circular No 3 of 2018.

**In ITA No. 5528/Mum/2015 for AY 2011-12**

7. The first issue in this appeal of Revenue is against the order of CIT(A) deleting the addition made by AO by treating the income of business income as against the claim of the assessee being investments made and surplus arising out of the same is Short term capital gains. Against the deleting of addition by CIT(A), Revenue has raised the following ground No. 1: -

*"1. Whether on the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in deleting the income assessed by the AO as business income of Rs. 5,90,83,084/- as against claim of the assessee as short term capital gain in the light of the facts that the investments made by the assessee out of common funds and in the backdrop of substantial trading transaction of shares made by the assessee are unascertainable to which purchases are being made for Investment and to which are made by investment?"*

8. At the outset, the learned Counsel for the assessee took us through the assessment order and stated that the AO treated the surplus arising out of the sale and purchase of shares as business income as against declared by assessee as short term capital gain amounting to ₹ 5,90,83,084/-. According to AO, the assessee has done trading in shares leading to speculation profit during the year and he also noted that substantial transactions of trading in shares does not segregate which purchases are made for investment and which are made for trading. The CIT(A) relying on the earlier year orders for AYs 2008-09, 2009-10 & 2010-11 treated the surplus arising on sale and purchase of shares as capital gains. For this he observed as under: -



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*“.....Similarly in A.Y. 2009-10 and 2010-11 also the issue was decided in favour of Appellant by my predecessor' and by me vide appellate order no. CIT(A)-2/IT/56/2012-14 dated 10.08.2015. I find that there is no change in the facts and circumstances of the case of the Appellant during the year under consideration vis-a-vis earlier year. Further the AO has also not brought any new facts or distinguishing feature as compared to earlier years. I find that the appellant has maintain separate portfolio for investment in shares and trading in shares, which clearly distinguishes the investment in shares from the trading in shares. In view of this on consistent with the decision taken by my predecessor in A.Y. 2008-09 and 2009-10, I hold that gain of Rs.5,90,83,084/- on sale of shares of Adani and Orbit should be assessed as Short Term Capital gains and not as business income. Hence Ground no. 2 is allowed in favour of the Appellant.”*

9. In term of the above, the learned Counsel for the assessee drew our attention to the Tribunals order for AY 2008-09 in ITA 135/Mum/2013 order dated 22.12.2017, wherein the Tribunal vide Para 17 and 18 has followed assessee's sister concern case for AY 2008-09 in the case of Addl.CIT vs. Money Motors (India) Pvt. Ltd. for AY 2008-09 in ITA No. 1019/Mum/2013 order dated 18.05.2017 and allowed the claim of the assessee by observing that the surplus arising out of sale and purchase of shares is capital gains vide Para 17 and 18 as under: -

*“17. Vide ground No. 6 the revenue has challenged the action of the Ld. CIT(A) in holding Rs. 33,96,98,628/- as short term capital gain instead of*



*treating the said amount as income from business or profession as held by the AO. This ground of appeal is identical to the last ground of the revenue's appeal in the assessee's own case pertaining to the assessment year 2008-09(supra). The coordinate Bench of the Tribunal has decided this issue in favour of the assessee holding as under:-*

*6. Last ground of appeal is related to treatment of Rs. 18.87 crore i.e. as to whether the profit arising on sale of securities should be assessed under the head business income or income from Short Term Capital Gain (STCG).*

*6.1 The AO found that the assessee had shown STCG of Rs. 18,49,132/-, that it had shown speculation profit of Rs. 10.13 crores on intra-day trading, that it had borrowed funds to the tune of Rs. 9.25 crores, that the assessee was actively involved in trading of shares. Vide his show cause notice dated 20.12.2010 he asked the assessee as to why the STCG should not be treated as business income. After considering the submission of the assessee, he held that it had shown sales of shares worth Rs. 154.91 crores, that it had purchased shares amounting to Rs. 180.58 crores, that it was not possible to ascertain as to whether the purchases were for investment or for trading, that the claim by the assessee to treat the income under STCG was only a ploy to pay less tax as against normal rate of*



*tax. Accordingly, he disallowed the STCG of Rs. 18.87 crores and treated the same as business income from trading in shares.*

*18. The facts pertaining to this issue is identical to the facts of the revenue's appeal in assessee's own case aforesaid. In view of the fact that the findings of the Ld. CIT(A) are in accordance with the decision of the co-ordinate Bench rendered in the assessee's own case for the assessment year 2008-09, we do not find any reason to deviate from the decision rendered by the co-ordinate Bench in assessee's own case. Hence, respectfully following the decision of the co-ordinate Bench of the Tribunal aforesaid, we uphold the findings of the Ld. CIT(A) and dismiss this ground of appeal of the revenue."*

10. Similarly, the Tribunal has also followed AY 2009-10 in ITA No. 1021/Mum/2013 vide order dated 31.01.2018 and accepted the claim of the assessee by observing in Para 4 as under: -

*"4. We noticed that the order passed by the learned CIT(A) in A.Y. 2008-09 has since been upheld by the Coordinate Bench of the Tribunal vide its order dated 22.12.2017 passed in ITA No. 135/Mum/2013. We further noticed that the assessee has realised short term capital gains on sale of shares of Orbit Corporation, Adani Enterprises Ltd. and GPC Ltd. We further noticed that all these shares have been purchased in the year relevant to A.Y. 2008-09 and have been sold during the year under consideration. In A.Y. 2008-09, these shares have been treated as "assessee's investments" and the gain arising on*



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*sale of part of those shares in that year has been accepted as short term capital gains by the Tribunal. Under these set of facts, the character of the shares as “assessee’s investments” cannot be tinkered with at this stage. Accordingly, we do not find any reason to interfere with the order passed by the learned CIT(A) on this issue.”*

When these were confronted to the learned Sr. Departmental Representative, he fairly agreed that yes, issue in earlier years is covered but he only supported the assessment order.

11. After hearing both the sides and going through the facts of the case, we find that the Tribunal has consistently allowed the claim of the assessee by holding that the assessee has made investments in sale and purchase of shares, which give rise to capital gains i.e. in this case the short term capital gains as disclosed by the assessee. Respectfully following the Tribunal's order in earlier years in assessee's own case, we dismiss this ground of Revenue's appeal.

12. The next issue in this appeal of Revenue is against the order of CIT(A) in deleting the disallowance made by AO of expenses relatable to exempt income added by AO by invoking the provisions of section 14A of the Act read with Rule 8D(2)(ii) and 8D(2)(iii) of the Rules. For this Revenue has raised the following ground Nos. 2 and 3: -

*“2. Whether on the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in holding that section 14A of the I. Act cannot be applied to expenditure incurred in relation to investments from no tax free income is earned or received by the assessee during the year under consideration which is contrary to the judgment of*



*special bench of Hon'ble ITAT, New Delhi in the case of M/s. Cheminvest Ltd, as reported in [2009] 121 ITD 318 (Delhi)(SB) in which the special bench of the tribunal has placed reliance on the decision of Hon'ble S.C. in the case of Rajendra Prasad Moody reported in 115 ITR 522(Supreme Court)?"*

*3. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not considering the decision In the case of M/s. Godrej & Boyce Mfg Co. Ltd. (2010) [328 ITR 80(Bom)], wherein It has held that no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to such Income which does not form the part of the total Income under the Act, by virtue of the provisions of section 14A of the LT. Act.?"*

13. Briefly stated facts are that the assessee has earned dividend income of ₹ 77,91,794/- and claimed the same as exempt. The assessee in its computation of income has suo moto disallowed a sum of ₹ 3.80 lakhs as expenses relatable to exempt income. The AO noticed from the accounts of the assessee that the computation of the assessee relating to disallowance of expenses is not correct and he has given the reasoning in Para 4.1 and 4.2 of the assessment order and applied Rule 8D(2)(ii) and 8D(2)(iii), thereby he disallowed the interest expenses at ₹ 4,02,202/- and administrative expenses at ₹ 12,68,852/-. Accordingly, the AO made addition of ₹ 2,91,054/-. Aggrieved, assessee preferred the appeal before CIT(A). The CIT(A) noted that there are no new facts in this year what was in AYs 2008-09 and 2009-10. He relying on assessee's own case for AY 2008-09 and 2009-10 deleted the disallowance by observing in Para 4.5 and 4.6 as under: -



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*“4.5. I have gone through the issue and the appellant's submission. I found that the same issue has already been considered by my predecessor in appellants own case for A.Y. 2008-09 and 2009-10 and in my appellate order no. CIT(A)-2/IT/56/2013-14 dated 10.08.2015 the same issue for A.Y.201011. The issue has been decided by my predecessor partly in favour of the appellant in A.Y.2009-10 at Para 5.8 of his order which is reproduced as under:*

*5.8 However, the Hon'ble Bombay High Court in the case of CIT Vs Delite Enterprises (ITA no. 110 of 2009 order dated 26.2.2009 has held that if there is no exempt income earned in that accounting year then there is no need to disallow any expenditure u/s.14A of the I.T. Act with regard to the tax free investments made. Following the Hon'ble Bombay High Court's decision, the Hon'ble Mumbai ITAT in the case of Avshesh Mercantile P. Ltd. Vs DCIT, Rg 3(1), Mumbai in ITA No.5779/Mum/2 606 order doted 13161212 has also held that if no tax free income is earned from o tax free investment, then no disallowance u/s.14A needs to be made with regard to that investment. Respectfully following these two decisions, (hold that no disallowance u/s. 14A need to be made with regard to the tax free investments, from which no tax free income is earned in this accounting year. In view of this, the A.O. is directed to exclude the tax free investments*



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*from which no tax free income is earned in this accounting year from the numerators in the calculations under Rule 80(2)(ii) and Rule 80(2)(iii) of the I. T. Rules and work out the disallowance u/s.14A of the I. T. Act and substitute the same for the disallowance worked out earlier. The A.O is directed to delete the balance disallowance made in the assessment order. The appellant is directed to produce the necessary details/documents required for the working.*

*4.6. I find that there is no change in the facts and circumstances of the case of the Appellant during the year under consideration vis-a-vis earlier year. Further the AO has also not brought any new facts or distinguishing feature as compared to earlier years. Respectfully following the decision of my predecessor in earlier year i.e.A.Y.2009-10 I direct the A.O. to exclude the tax free investment from which no tax free income is earned during this accounting year from the numerators in the calculation under Rule 8D(2)(ii) and 8D(2)(iii) of the I.T. Rule and reworkout the disallowance and substitute the same for disallowance worked out earlier. The AO is directed to delete the balance disallowance made in the assessment order. Hence Ground No. 4 is partly allowed.”*

14. At the outset, the learned Counsel for the assessee stated that even Tribunal in AYs 2008-09 and 2009-10 has confirmed the action of the CIT(A) deleting the disallowance. He referred to the Tribunal's order for AY 2008-09 in ITA No. 135/Mum/2013 order dated 22.12.2017 and



Tribunal vide Para 15 confirmed the action of the CIT(A) deleting the disallowance by observing as under: -

*“14. In the earlier paragraphs we have noticed that the Ld. CIT(A) has deleted the addition of loan amounts and consequently the interest payable on those loans was held to be allowable as deduction. Since, we have upheld the view taken by the Ld. CIT(A) with regard to the addition of loan amounts, we also uphold the order passed by Ld. CIT(A) in deleting the disallowance of interest expenditure.*

*15. Ground No. 4 and 4.1 pertain to disallowance u/s 14A of the Act read with Rule 8D of the Income Tax Rules 1962 (Rules). This ground is identical to ground 4 of the revenue’s appeal in the assessee’s own case pertaining to the assessment year 2008-09(supra). As in the earlier year, the AO computed the disallowance u/s 14A of the Act as per Rule 8D of IT rules. The Ld CIT(A) held that the disallowance out of interest expenditure and administrative expenses is called for. However, by following the decision of Hon’ble Bombay High Court in the case of Delite Enterprises (ITA No.110 of 2009 dated 26-02-2009), the Ld CIT(A) held that no disallowance is required to be made in respect of tax free investments from who no tax free income was earned. Accordingly he directed the AO to exclude the investments from which no exempt income was earned. Identical view had been taken by Ld CIT(A) in AY 2008-09 also. The coordinate Bench of the Tribunal has decided this issue in favour of the assessee holding as under:-*

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5 Aggrieved by the order of the AO, the assessee preferred an appeal before the FAA and made detailed submissions. He directed the assessee to establish the direct nexus between the non-interest bearing funds and the investment in tax exempt income. That the assessee could not file details in that regard, so, he held that tax free investments were made out of the common funds, that interest expenditure had to be worked out as per Rule 8D (2)(ii) of the Rules. Referring to the matter of *Delight Enterprises* (ITA No. 110 of 2009, dt. 26/12/2009) of Hon'ble Bombay High Court he held that no disallowance u/s 14A was to be made with regard to tax free investment from which no exempt income was earned during the year under appeal. Accordingly, he directed the AO to exclude the tax free investment from which no exempt income was earned from numerators in the calculation u/s 8D (2)(ii) and 8D(2)(iii) of the Rules. He further directed the assessee to produce necessary details/documents to calculate the disallowance.

5.2 Before us, the DR stated that matter could be decided on merits. The AR stated that assessee had not challenged the order of the FAA. We find that the FAA had not deleted the entire addition, that he had followed the judgment of Hon'ble Jurisdictional High Court and had directed the



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*AO to recalculate the disallowance, that he had instructed assessee to file necessary details. In our opinion there is no need to disturb his findings, therefore, confirming his order we decide Ground No. 4 against the Assessing Officer.*

*Consistent with the view taken by the co-ordinate bench in the earlier year, we uphold the order passed by Ld CIT(A) on this issue.”*

15. Now, before us the learned Sr. Departmental Representative except relying on the assessment order could not bring anything new or no new argument was made. After hearing the rival contentions and going through the facts and circumstances of the case that the issue is squarely covered by the tribunals decision in ITA No. 135/Mum/203 order dated 22.12.2017. Respectfully following the same, we confirm the order of CIT(A) deleting the disallowance. This issue of Revenue's appeal is also dismissed.

**16. In the result, both the appeals of Revenue are dismissed.**

Order pronounced in the open court on 20-08-2018.

Sd/-

(एन. के. प्रधान /N.K. PRADHAN)

(लेखा सदस्य / ACCOUNTANT MEMBER)

Sd/-

(महावीर सिंह /MAHAVIR SINGH)

(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 20-08-2018

सुदीप सरकार, व.निजी सचिव / Sudip Sarkar, Sr.PS



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**आदेश की 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 (Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai