**आयकर अपील य अ धकरण, अहमदाबाद  यायपीठ**

**IN THE INCOME TAX APPELLATE TRIBUNAL,**
**''A''BENCH, AHMEDABAD**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER**
**And**
**MS MADHUMITA ROY, JUDICIAL MEMBER**

आयकर अपील सं./**ITA No.610/AHD/2014**

**नधारण वष/Asstt. Year: 2010-2011**

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| D.C.I.T,<br>Circle-3, Room No.109,<br>'B' Wing, 1st floor,<br>Pratyakshyakar Bhawan,<br>Panjrapole, Ambawadi,<br>Ahmedabad | Vs. | M/s Goldmine Stocks Pvt. Ltd.,<br>4, Niranjan Nirakar Society,<br>Shreyas Railways Crossing,<br>Paldi,<br>Ahmedabad-380005.<br><br>PAN: AAACG5445N |

| **(Applicant)** | | **(Respondent)** |
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| Revenue by | : | Shri S.K. Dev, Sr. D.R |
| Assessee by | : | Shri S.N. Soparkar, A.R |

सुनवाई क तारख/**Date of Hearing : 22/01/2019**
घोषणा क तारख **/Date of Pronouncement: 18/02/2019**

**आदेश/O R D E R**

**PER WASEEM AHMED, ACCOUNTANT MEMBER:**

The captioned appeal has been filed at the instance of the Revnue against the order of the Commissioner of Income Tax (Appeals)- II, Ahmedabad [Ld.CIT(A) in short] vide appeal no.CIT(A)-II/ACIT. Cir.3/ABD/90/2013-14 dated 05/12/2013 arising in the matter of assessment order passed under s.143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") dated 30/03/2012 relevant to Assessment Year (AY) 2010-11.

2. The Revenue has raised the following grounds of appeal:

*(1) The CIT(A) has erred in law and on facts in allowing the claim of Bad debts of Rs.2.37 Crores which was the cost of shares purchased on behalf of clients which was never accounted for as income. Hence the conditions laid down u/s 36(2) were not fulfilled.*

*(2) The CIT(A) has erred in law and on facts by deleting the addition of Rs. 8.17 lacs made u/s 14A r.w.r 8D despite the fact that the assessee had earned exempt income of Rs.39.54 lacs, made such investment and had itself given the working of the said disallowance u/s 14A r.w.r 8D during assessment proceedings.*

3. At the outset the learned counsel for the assessee drew our attention on the application filed under rule 27 of Income Tax Appellate Tribunal Rules 1963 dated 12th June 2018 whereby it was claimed that the assessee is entitled to deduction for the losses incurred in the course of the business as bad debts under section 36(1)(vii) read with section 36(2) of the Act.

4. The learner DR raised no objection on the admission of the application filed by the learned AR under rule 27 of ITAT rules 1963.

5. Here, first of all, we have to refer to Rule 27 of the Rules, which reads as under:-

> *"27. The respondent, though he may not have appealed, may support the order appealed against on any of the grounds decided against him."*

5.1 We find from this rule that respondent may support order on the ground decided against him even though he has not appealed against an order deciding one of the grounds against him. In the present case before us, the CIT(A) has allowed the appeal of the assessee on merits and relief has been granted by deleting all the additions under section 28(i) of the Act by rejecting the claim of the assessee under section 36(2) of the Act.

In view of the above facts, we admit the ground of the assessee under Rule-27 and accordingly proceed to adjudicate the same.

6. The 1st issue raised by the Revenue is that the Ld.CIT (A) erred in deleting the addition made by the AO for Rs. 2.37 crores as bad debts though the condition specified u/s 36(2) of the Act were not fulfilled.

7. Briefly stated facts are that the assessee is a private limited company and engaged in the business of share broking as an agent. The assessee buys and sells shares/securities listed with NSC/BSC on behalf of his client and earned commission income thereon. The assessee in the year under consideration has claimed bad debts by debiting its profit and loss accounts for Rs. 2,37,38,789/- only. The assessee further claims that such bad debts are representing the business loss incurred by it in the course of its business. Thus the same is allowable as deduction u/s 28(1) of the Act. The assessee also submitted that similar deduction was allowed in the own case of the assessee by the ITAT for the A.Ys 1999-2000, 2000-2001 and 2001-02.

7.1 The assessee in support of his contentions has furnished necessary details of the parties such as name, addresses, PAN and transactions.

7.2 The assessee also submitted that the amount was due from the client on account of the shares purchased on behalf of them and the same was not offered to tax by it. As such the assessee in its books of accounts has shown temporary loan to its parties.

7.3 The commission earned by it on sale/purchase of securities on behalf of his client was duly offered to tax.

8. However, the AO during the assessment proceedings observed that the assessee is acting as a commission agent and buying and selling of shares securities on behalf of his client. As such the transaction of purchase/sale carried out on behalf of the clients by the assessee was never treated as part of the profit and loss accounts. But the commission earned by the assessee on such transaction was duly offered to tax. Accordingly, the AO was of the view that the assessee is not entitled to bad debts as it has not fulfilled the conditions as specified u/s 36 (2) of the Act.

8.1 The AO was also of the view that the assessee is not in the business of banking or money lending. Therefore, the question of deduction u/s 36(1)(vii) r.w.s. 36(2) of the Act does not arise. Thus the AO disallowed the claim and added to the total income of the assessee.

9. Aggrieved assessee preferred an appeal to Ld.CIT(A). The assessee before the Ld.CIT (A) submitted that it had purchased the shares on behalf of its customer and it was committed to make the payment to the stock exchange for such transactions of the purchase of shares. Thus as such, the assessee has fulfilled its commitment by making payment to the stock exchange but failed to recover the same from the parties. Accordingly, it has incurred the loss which was claimed as bad debts.

9.1 The assessee also claimed to have instituted legal claim u/s 138 of The Negotiable Instruments Act on account of the cheques issued by the parties which were subsequently dishonoured.

9.2 The assessee also claim that it is eligible for deduction on account of the loss incurred in the course of business u/s 28(1) of the Act.

10. However the Ld.CIT (A) was of the view that the assessee is not eligible for deduction u/s 36(1)(vii) r.w.s. 36(2) of the Act. But the same can be claimed as deduction u/s 28(1) of the Act r.w.s 37 of the Act. Accordingly, the Ld.CIT (A) disallowed the claim of the assessee as bad debts u/s 36(2) of the Act but deleted the addition made by the AO by holding that bad debts are representing the business loss incurred in the course of the business.

11. Being aggrieved by the order of the Ld.CIT (A) the Revenue is in appeal before us.

12. The Ld. DR vehemently supported the order of the AO.

13. On the other hand the Ld.AR, before us, filed an application under Rule 27 dated 12/06/2018 and submitted that the deduction u/s 36(1)(vii) r.w.s 36(2) of the Act is available. The Ld. AR vehemently supported the order of the Ld.CIT(A).

14. We have heard the rival contentions and perused the materials available on record. In the instant case, the bad debts claimed by the assessee were disallowed by the AO by observing that the assessee did not fulfill the conditions as specified under section 36(2) of the Act. As such the assessee has not offered the amount of bad debts as income in its books of accounts. Therefore the disallowance was made by the AO.

14.1 However, the Ld.CIT (A) duly admitted the fact that the deduction claimed by the assessee on account of bad debts is not eligible for deduction under section 36(1)(vii) r.w section 36(2) of the Act but held that the impugned bad debts represent the loss incurred by the assessee in the course of the business. Therefore, the same can be allowed as a deduction either under section 28(i) or 37(1) of the Act.

14.2 From the preceding discussion, we note that there is no doubt about the genuineness of the loss claimed by the assessee. As such the assessee in support of such loss has furnished the necessary details as detailed as under:

i) Copies of the PAN and addresses of all the parties.

ii) Detail of the petitions under section 138 of The Negotiable Instruments Act filed against the parties for the dishonour of cheques issued by the parties.

iii) The copies of the ledger accounts showing the details of the purchases and sales of the shares on behalf of the parties shown in the ledger account.

iv) The commission income from the purchase and sales of shares/securities on behalf of the parties was duly offered to tax.

14.3 Thus, there remains no ambiguity that the losses claimed by the assessee were incurred in the course of the business. It is also a fact on record that the bad debts claimed by the assessee were not offered to tax as mandated under section 36(2) of the Act. Therefore, the same cannot be allowed as a deduction under section 36(1)(vii) of the Act. But the same can be claimed as a deduction under section 28(i) of the Act which reads as under:

**"Profits and gains of business or profession.**

[39]**28.** [40]The following income shall be chargeable to income-tax under the head ñProfits and gains of business or professionò,ð

(*i*) the profits and gains [41] of any business or profession [41] which was carried on by the assessee at any time during the previous year

14.5 A perusal of the above provision of the section reveals that the profit and gain from the business are chargeable to tax under chapter IV of the Act. Thus the assessee is eligible for the deduction of all the expenses/losses incurred in the course of the business. After that, the assessee can determine the income chargeable to tax under the head business and profession. In this regard, we find support and guidance from the order of Delhi Tribunal in the case of Jalpardeep Securities Limited Vs. DCIT reported in 4 ITR (T) 491 wherein it was held as under:

> *"Held that, since the amount of debt written off in the profit and loss account had not been accounted for as income in the earlier year, there was no reason to allow the said loss as bad debts under section 36(1)(vii) read with section 36(2). However, at the very same time, the loss so incurred has arisen in the course of business in respect of the transactions entered into by the assessee on behalf of its clients and due to their non-payment of dues. The same was written off as bad debts. The genuineness of the transactions so entered into by the assessee in the course of its business as share-broker had not been doubted. It was a normal business transaction loss which occasioned in the share broking business of the assessee. Merely because claim was filed by the assessee as a bad debt under section 36(1)(vii), the same could not be disallowed even after finding that it was a business loss to the assessee and was to be considered while computing its business income under section 28.*
>
> *Hence, the assessee's claim was to be allowed as business loss."*

14.6 Indeed the assessee has claimed as bad debts in its books of accounts, but in our considered view the nomenclatural of the deduction cannot be the criteria for allowing/disallowing the deduction for which the assessee is entitled. The AO was to see the substance in the claim of the assessee over the

form. The substance in the claim of the assessee is that the loss incurred by it was in the course of the business. Thus the same is allowable as a deduction to the assessee.

14.7 We also note that the CBDT in a circular bearing number 14(XL-35) dated 11-04-1955 has instructed to the income tax authorities to allow the legitimate claim of the assessee though those were claimed under the wrong head. The relevant extract of the CBDT circular reads as under:

> *"(3) Officers of the Department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard the Officers should take the initiative in guiding a taxpayer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit the department for it would inspire confidence in him that he may be sure of getting a square deal from the department."*

14.8 We also note that the transactions of purchase and sales of the shares were closely connected with the brokerage income of the assessee. Such brokerage income has already been offered to tax by the assessee in its income tax return. Accordingly, the loss incurred by the assessee in relation to the brokerage business of the assessee is allowable as bad debts under section 36(1)(vii) r.w.s. 36(2) of the Act. In similar facts & circumstances, the Hon'ble Bombay High Court has held that the conditions specified under section 36(1)(vii) of the Act has been duly complied with and accordingly the assessee is eligible for deduction as bad debts. Thus we place our reliance on the judgment of Hon'ble Bombay High Court in the case of CIT Vs. Shreyas S. Morakhia reported in 342 ITR 285 wherein it was held as under:

> *"The value of the shares transacted by the assessee as a stock broker on behalf of its client is as much a part of the debt as is the brokerage which is charged by the assessee on the transaction. The brokerage having been credited to the profit and loss account of the assessee, it was evident that a part of the debt was taken into account in computing the income of the*

*assessee for previous year. The fact that the liability to pay the brokerage may arise, as contended by the revenue, at a point in time anterior to the liability to pay the value of the shares transacted would not make any material difference to the position. Both constitute a part of the debt which arises from the very same transaction involving the sale or as the case may be purchase of shares. Since both form a component part of the debt, the requirements of section 36(2)(*i*) are fulfilled where a part thereof is taken into account in computing the income of the assessee. In its impugned decision the Tribunal has left the issue as regards the value of the shares which remain in the hands of the assessee which has to be adjusted against the amount receivable from the client to be determined before the regular Bench of the Tribunal following the view of the Special Bench. The view which has been taken by the Special Bench is, with respect, in accordance with law.*

*Accordingly, it is held that the assessee is entitled to deduction by way of bad debts under section 36(1)(*vii*) read with section 36(2) in respect of the amount which could not be recovered by him from his clients in respect of transactions effected by him on behalf of his clients apart from the commission earned by him*

14.9 Subsequently, the Hon'ble Gujarat High Court in the case of principal CIT Vs. Shah Investors Home Ltd in tax appeal No. 279 of 2017 after having a reliance on the judgment of Hon'ble Bombay High Court as discussed above has decided the issue in favor of the assessee. As such before the Hon'ble Gujarat High Court the following question of law was involved:

*''(3) Whether on the facts and circumstances of the case, the Appellate Tribunal was justified in deleting the disallowance of deduction of Bad debts of Rs.12,00,000/-''*

The above question of law was answered by the Hon'ble Gujarat High Court as follows:

*''[4.2] The Revenue is not disputing that the Rs.12,000/- was towards Bad Debts due and payable by NIFCL with whom the assessee did the business upto 2000-01. It appears that thereafter the same was not*

*recoverable and therefore, in the year under consideration the assessee treated it as a Bad Debt and claimed the deduction under section 36(1) (vii) of the Act. Considering the decision of the Bombay High Court in the case of Shreyas S. Morakhai (Supra), such claim is allowable. Under the circumstances, no error has been committed by the learned ITAT in deleting the disallowance of deduction of Bad Debt of Rs.12,00,000/-. No substantial question of law arise.''*

In view of the above and after considering the facts in totality, we hold that the assessee is eligible for deduction on account of the bad debts claimed by it under section 36(2) r.w.s. 36(1)(vii) of the Act. Accordingly, we do not find any reason to disturb the finding of the Ld.CIT (A). Hence the ground of appeal of the Revenue is dismissed, and the ground raised in the application under rule 27 of ITAT Rules is allowed.

15. The next issue raised by the Revenue is that Ld.CIT (A) erred in deleting the addition made by the AO for Rs. 8.17 lacs u/s 14A r.w Rule 8D of Income Tax Rule.

16. The assessee during the year has earned dividend income of Rs. 39,54,153/- which was claimed to be exempted u/s 10(34) of the Act. However, the AO found that no disallowance of the expenses has been made u/s 14A r.w Rule 8D of Income Tax Rule. Accordingly the AO worked out the disallowance of Rs. 8,17,544/- as detailed under.

| **Sr.No.** | **Particular** | **Amount in Rs.** |
|---|---|---|
| 1. | Direct Expenses | Nil |
| 2. | Interest Expenses | 40,752/- |

| | | |
|---|---|---|
| 3. | Administrative Expenses | 7,76,792/- |
| Total | | 8,17,544/- |

The above amount was disallowed u/s 14A r.w. Rule 8D of Income Tax Rule and added to the total income of the assessee.

17. Aggrieved assessee preferred an appeal to Ld.CIT (A). The assessee before the Ld.CIT (A) submitted that its fund exceeds the amount of investment. Therefore no disallowance on account of interest expenses can be made.

17.1 The assessee also claims that it has not incurred any expenses in connection with such dividend income. Therefore no disallowance on account of administrative expenses is warranted.

18. The Ld.CIT (A) after considering the submission of the assessee deleted the submission made by the AO by observing as under:

> *8.2 1 have carefully perused the submission of the A.R. and the facts of the case discussed in the assessment order by the Assessing Officer. It is seen that the appellant had made investment in shares and securities out of its own funds and there were no borrowings of the funds involved and hence t here was no expenditure on interest or otherwise, for receiving the dividend. Therefore, since no expenditure has been claimed on earning the dividend income, there was no question of any disallowance u/s.14A of the Act out of dividend income. The Assessing Officer was not correct in invoking rule 8D of the 1. T. Rules for quantifying the expenditure for disallowance. Therefore, it is held that the Assessing Officer was not justified in making the disallowance u/s.14A which is hereby deleted. The ground of appeal succeeds.*

19. Being aggrieved by the order of Ld.CIT (A) Revenue is in appeal before us.

20. Both the parties before us relied on the order of the parties below as favorable to them.

21. We have heard the rival contentions and perused the materials available on records. From the proceedings discussion, we note that assessee has earned dividend income amounting to Rs. 39,54,153/- but no disallowance of any expenses u/s 14A r.w. Rule 8D was made. Therefore the disallowances of Rs. 8,17,544/- was made by the AO,

21.1 However the Ld.CIT (A) deleted the addition made by the AO by observing that there was no borrowed fund used by the assessee in the investment of shares.

21.2 At the outset, we note that the Ld.CIT (A) has given very clear cut findings that the own fund of the assessee exceeds the investment. Therefore the question of making the disallowance on account of interest expenses is not warranted. In this regard we find support and guidance from the judgment of Hon'ble Bombay High Court in the case of *Reliance Utilities and Power Ltd.* reported in 313 ITR 340 wherein it was held as under:-

> *"The principle therefore would be that if there are funds available both interest-free and overdraft and/or loans taken, then a presumption would arise that investments would be out of the interest-free fund generated or available with the company, if the interest-free funds were sufficient to meet the investments. In this case this presumption is established considering the finding of fact both by the CIT(A) and Tribunal".*

Similarly, we also rely on the judgment of the Hon'ble Bombay High Court in the case of *CIT vs. HDFC Bank Ltd* reported in 366 ITR 505 (Bom). The relevant extract of the order is reproduced below:-

> *"Where assessee's capital, profit reserves, surplus and current account deposits were higher than the investment in tax-free securities, it would have to be presumed that investment made by the Assessee would be out of the interest-free funds available with Assessee and no disallowance was warranted u/s 14A."*

21.3 Similarly, we also find support from the judgment of Hon'ble Gujarat High Court in the case of UTI Bank Ltd. reported in 32 Taxmann.com 370 where the headnote reads as under :

> *"If there are sufficient interest free funds to meet tax free investments, they are presumed to be made from interest free funds and not loaned funds and no disallowance can be made under section 14A".*

In view of the above proposition, we hold that no disallowance of interest expense claimed by the assessee can be made on account of investments as discussed above.

21.4 Regarding the administrative expenses, we note that the disallowance needs to be as per the provision of Rule 8D but the taking into consideration only those investments which have yielded dividend income in the year under consideration. In this regard, we find support and guidance from the judgment of Hon'ble Delhi High Court in the case of ACB India Limited Vs. ACIT reported in 62 taxmann.com 71 wherein it was held as under:

> ***"8.*** *The Assessing Officer, instead of adopting the average value of investment of which income is not part of the total income, i.e., the value of tax exempt investment, chose to factor in the total investment itself. Even though the Commissioner of Income-tax (Appeals) noticed the exact value of the investment which yielded taxable income he did not correct the error but*

*chose to apply his own equity. Given the record that had to be done so to substitute the figure of Rs. 38,61,09,287 with the figure of Rs. 3,53,26,800 and, thereafter, arrive at the exact disallowance of .05 per cent."*

21.5 Thus we are inclined to restore the issue to the file of AO with the direction to consider those investments for making the disallowance of administrative expenses in Rule 8D of Income Tax Rule which have yielded the dividend income during the year.

21.6 We also find that the assessee has not produced before us its financial statement demonstrating that its fund exceeds the amount of investments. However, in the interest of justice and fair play, we remit the issue to the file of AO for fresh adjudication after verification whether the own fund of assessee exceeds the investments. If it is so then, there will not be any addition on account of interest expenses u/s 14A r.w. Rule 8D of Income Tax Rule. Thus the ground of appeal of the Revenue is allowed for statistical purposes.

22. In the result, the appeal of the Revenue is partly allowed for statistical purpose.

**Order pronounced in the Court on 18/02/2019 at Ahmedabad.**

| | |
|---|---|
| **-Sd-** | **-Sd-** |
| **(MS MADHUMITA ROY)** | **(WASEEM AHMED)** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

**(True Copy)**

Ahmedabad; Dated 18/02/2019

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**आदेश क□ □□त□ल□प □ेषित/Copy of the Order forwarded to :**

1. अपीलाथ□ / The Appellant
2. □□यथ□ / The Respondent.
3. संब□धित आयकर आयु□त / Concerned CIT
4. आयकर आयु□त(अपील) / The CIT(A)
5. □वभागीय □□त□नाध, आयकर अपील□य अ□धकरण / DR, ITAT,
6. गाड□फाईल / Guard file.

**आदेशानुसार**/BY ORDER,

**उप/सहायक पंजीकार** (Dy./Asstt.Registrar)
**आयकर अपील□य अ□धकरण, अहमदाबाद / ITAT, Ahmedabad**