

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'G' NEW DELHI**

**BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
&
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER**

**ITA No.6481/Del/2016
Assessment Year: 2013-14**

**Asstt. Commissioner of Income- vs VivitaRelan,
tax, Circle -54(1), New Delhi. C-121, Defence Colony,
New Delhi.
PAN: AJCPR2578R**

AND

**ITA No.5626/Del/2016
Assessment Year: 2013-14**

**VivitaRelan, vs Asstt. Commissioner of Income-
C-121, Defence Colony, tax, Circle -54(1), New Delhi.
New Delhi.
PAN: AJCPR2578R
(Appellant) (Respondent)**

Assessee by: Shri Sandeep Sapra, Advocate
Department by: Shri N.K. Bansal, Sr. DR

Date of Hearing: 28.02.2019
Date of Pronouncement: 22 .03.2019

ORDER

PER NARASIMHA K. CHARY, JM

These two appeals are filed by the assessee and Revenue respectively challenging the order dated 05.09.2016 passed by the Learned Commissioner of Income-tax(Appeals)-18, New Delhi {"CIT(A)"} for Assessment Year 2013-

14, where under learned CIT(A) directed the deletion of the addition of Rs.68,49,607/- made by the Assessing Officer under the head “Profit and Gains from Business or Profession” but sustained the addition of Rs.7,82,753/- u/s 14A of the Income-tax Act, 1961 (‘the Act’) read with Rule 8D(2)(iii) of the Income-tax Rules, 1961 (“the Rules”).

2. Brief facts of the case are that the assessee is an individual deriving income from the business or profession, capital gains and other sources. During the financial year 2012-13, the assessee filed her return of income on 19.09.2013 declaring the income as nil with the following particulars:

(i)	Profit/loss on sale/purchase of equity/funds	Rs.23,23,079/-
(ii)	Short term capital gain	Rs. 7,008/-
(iii)	Short term capital loss (STT paid)	Rs. 2,48,690/-
(iv)	Long term capital loss	Rs.70,52,260/-
(v)	Dividend	Rs. 1,43,972/-

Out of the loss of Rs.23,23,079/-, the assessee had shown the net loss to the tune of Rs.19,74,492/- after reducing the dividend income to the tune of Rs.1,43,972/-, disallowance of expenses attributable to the exempt income to the tune of Rs.3795/- and also reducing the disallowance u/s 14A of the Income-tax Act at Rs.4,88,764/-.

3. Learned AO observed that the assessee is fully involved in the business of trading of securities of various nature and primarily held that the income shown under the head ‘long term and short term capital gains’ had to be assessed under the head ‘Income from business’. The assessee submitted that she is an investor in individual capacity and her intention towards acquisition of mutual fund/debentures and income by way of dividend and/or long term/short term capital gains and not as business income. She further contended that she was studying the market herself in investing in mutual funds/debentures and did not take the help of any expert or professional for earning the same. Ld. AO,

however, observed that the assessee has been engaged in the business of purchase and sale of equity/shares and also F&O and the same assessee is carrying out the same business with her funds and the only difference is that the income from sale purchase of few securities are shown under the head 'capital gains' and the activity of the assessee proves that she is engaged in the business of purchase and sale of securities in an organized and regular manner and showing the income under different heads is just a strategy to avoid tax.

4. In support of his observation, ld. AO derived strength from the profit and loss account of the assessee for the concerned year. Ld. AO referred to the CBDT circulars on the question of nature of transaction of purchase and sale of shares where investment or trading and looking at the volume of transaction and quantum of investment, reached a conclusion that the income earned by the assessee on purchase and sale of securities was not the income from investment but it had to be considered as from the business or profession. Accordingly, learned AO considered that the loss of Rs.70,52,260/- on listed securities is not the actual loss on the sale of said funds and the assessee purchased those funds for an aggregate of Rs.4,97,45,211/- and sold them for an aggregate of Rs.5,68,36,501/- and , therefore, there is a profit of Rs.70,91,289/- and thus, a sum of Rs.68,49,607/- has to be added back to the income of the assessee under the head 'Profits and gain from business or profession'.

5. Next, learned AO found that during the year the assessee had received a dividend of Rs.1,43,972/- which she claimed as an exempt and in her computation had disallowed Rs.3795/- u/s 14A of the Act and such act of disallowance by the assessee amounts to the admission of applicability of Section 14A of the Act and, therefore, the disallowance has to be computed in accordance with the provisions of Rule 8D(2) of the Income-tax Rules, 1962. Learned AO, therefore, called out the figures from the profit and loss account

and while working out the disallowance under Rule 8D concluded that a sum of Rs.34,21,181/- has to be disallowed u/s 14A read with Rule 8D(2)(iii).

6. When the assessee preferred appeal against the said additions, learned CIT(A) after appreciating the facts on record found that the facts involved in this year are more or less identical to the facts involved for the AY 2012-13. He, therefore, while following the reasons and conclusions reached by him in the appeal for the AY 2012-13 directed that the amount assessed by the learned AO as income from business be assessed under the head 'income from short term capital gains and long term capital gains' as declared by the assessee. At the same time, learned CIT(A) upheld the findings of the learned AO in respect of addition u/s 14A read with Rule 8D and confirmed such an addition. Assessee, therefore challenged the addition u/s 14A read with Rule 8D whereas the Revenue challenged the deletion of Rs.68,49,607/-.

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7. In so far as the addition u/s 14A is concerned, the main plank of argument advanced on behalf of the assessee is that the assessee herself disallowed a sum of Rs.3795/- and without recording any reasons by the learned AO for not being satisfied with the correctness of the claim of the assessee in respect of such an expenditure in relation to the income which does not form part of the total income under the Act, learned AO jumped to the conclusion that such a disallowance has to be computed in accordance with the provisions under Rule 8D(2). Learned AR placed reliance on the decision of the Hon'ble Apex Court in the case of Godrej & Boyce Manufacturing Co. Ltd., 394 ITR 449 (SC) and submitted that in assessee's own case for the AY 2010-11, a coordinate bench of this Tribunal in ITA No.2248/Del/2015 held that when learned AO failed to record the satisfaction as to the correctness of the claim of the assessee in

respect of the expenditure incurred for earning the exempt income, in view of the decision of the Hon'ble Apex Court in the case of Godrej & Boyce Manufacturing Co. Ltd (supra), there is no option left to the Tribunal but to direct the deletion of the disallowance.

8. Per contra, learned DR placed reliance on the impugned order and submitted that when the assessee earned the exempt income to the tune of Rs.1,43,972/- and disallowed a sum of Rs.3795/-, it goes without saying that the provisions under Section 14A are applicable and consequently, the disallowance has to be computed in accordance with the provisions of Rule 8D(2) of the Rules and, therefore, there is no scope for interference with the findings reached by the learned CIT(A).

9. In the assessment order, the observations of the learned AO on this aspect read as follows:

“The assessee in her computation of income has disallowed Rs.3795/- as disallowance u/s 14A of the Income-tax Act, 1961. It is thus admitted that provisions of Section 14A of the Income-tax Act, 1961 are applicable in the case of the assessee. The case of the assessee is thus squarely covered u/s 14A of the Income-tax Act, 1961. The only dispute can be with the working given by assessee and amount of disallowance to be worked out in accordance with the provisions of Rule 8D(2) of the Income-tax Rules, 1962.”

10. It, therefore, goes without saying that before jumping to the conclusion that the disallowance has to be worked out in accordance with the provisions of Rule 8D(2) of the Rules, learned AO did not refer to the correctness or otherwise of the disallowance made by the assessee herself. Requirement of law under Rule 14A(2) is that it is only if the AO having regard to the accounts of the assessee is not satisfied with the correctness of the claim in respect of such an expenditure in relation to the income which does not form part of the

total income under the Act then only the AO shall determine the amount of expenditure incurred in accordance with the method prescribed under Rule 8D. Rule 8D(1)(a) also reflects this mandate of law. Further in the case of Godrej & Boyce Manufacturing Co. Ltd (supra), the Hon'ble Supreme Court held as under:

“The requirement for attracting the provisions of section 14A(1) of the Act is proof of the fact that the expenditure sought to be disallowed had actually been incurred in earning the dividend income. Prior to the introduction of sub-section (2) and (3) of section 14A of the Act by Finance Act, 2006 with effect from April 2007, such a determination was requirement to be made by the Assessing Officer to the best of his judgment. Sub-section (2) and (3) of section 14A of the Act read with rule 8D of the Income-tax Rules 1962 merely prescribe a formula for determination of expenditure incurred in relation to income which does not form part of the total income under the Act in a situation where the Assessing Officer is not satisfied with the claim of the assessee. Whether such determination is to be made on application of the formula prescribed under rule 8D or to the best judgment of the Assessing Officer, what the law postulates is the requirement of a satisfaction of the Assessing Officer that having regard to the accounts of the assessee, as placed before him, it is not possible to generate the requisite satisfaction with regard to the correctness of the claim of the assessee. It is only thereafter that the provisions of section 14A(2) and (3) read with rule 8D of the Rules or a best judgment determination, as earlier prevailing, would become applicable”.

11. When we apply the provisions of Section 14A read with Rule 8D(1)(a) in the light of the observations of the Hon'ble Supreme Court in the case of Godrej & Boyce Manufacturing Co. Ltd (supra) to the facts of the case, irresistible conclusion is that any addition made in violation of the above, cannot be sustained. We, therefore, while respectfully following the above line of decision allow grounds of assessee's appeal and direct the learned AO to delete the same.

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12. Now coming to the Revenue's appeal, learned CIT(A) recorded the fact that year after year in assessee's own case, the additions are made while treating the short term and long term capital gain income as the income from business and profession and more particularly for the AY 2012-13, learned CIT(A) after elaborately dealing with this issue reached a conclusion that the contention of the assessee with this particular income from the trading of shares has to be treated as income from short term and long term capital gain as against the finding of the learned AO to treat it as income from business.

13. It is brought to our notice by the learned AR that the appeal preferred by the Revenue against the orders of the learned CIT(A) for the AY 2010-11 deleting the addition by treating the income shown by the assessee as income from short term and long-term capital gain as it is and not accepting with the finding of the AO that this income had to be treated as business income, a coordinate Tribunal decided the issue in favour of the assessee in ITA No 2248/Del/2005 by order dated 23.8.2018.

14. It is further submitted by the learned AR that in respect of AYs 2009-10 and 2011-12, as could be seen from the assessment orders vide page Nos. 54 to 59 and 153-158 of the paper book, learned AO accepting the same as short term gain and long term capital gain, as the case may be, but it is only in respect of AY 2010-11, 2012-13 and 2013-14, learned AO started raising dispute to treat this amount as short term and long term capital gain. It is further submitted that in respect of all the three years, learned CIT(A) had taken a consistent view that this receipt must be treated not as income from business but has to be treated as income from short term capital gain and long term capital gain.

15. Absolutely, there is no dispute on the similarity of the facts permeating all through these years. In respect of AY 2010-11, the findings of the Id. CIT(A) are upheld by a coordinate bench of this Tribunal in ITA No.4106/Del/2015 whereas as stated supra, Revenue has accepted such finding of the learned CIT(A) in respect of AY 2012-13.

16. We have gone through the order dated 23.8.18 in ITA No.4106/Del/2015. In identical factual matrix, a coordinate bench of this tribunal in the light of the decision of the Hon'ble jurisdictional High Court in the case of CIT vs Avinash Jai, 362 ITR 441 (Del) and CIT vs CNB Finwiz Ltd., 369 ITR 228 (Del) held that the law on this aspect is fairly settled and in the facts and circumstances of the case, learned CIT(A) was right in directing the AO to treat the impugned receipt as income from capital gains and not as business income. In view of the consistent view on this aspect i.e. the view taken by the Id. CIT(A) for all the Asstt. Years 2010-11, 2012-13 and 2013-14 and a coordinate bench confirming such a view for the AY 2010-11 whereas Revenue accepting the same for AY 2012-13, we are of the considered opinion that in the absence of any change in the fundamental facts permeating these three years, it would not be appropriate to allow the position to be changed in a subsequent year. We find our opinion fortified by the decision of the Hon'ble Supreme Court in the case of Radhasoami Satsang vs CIT, 193 ITR 321.

17. In this set of circumstances, we direct the learned AO to treat this particular receipt as income from short term and long term capital gain but not as income from business. With this view of the matter, we do not find anything illegal or irregular in the finding of the learned CIT(A) and accordingly uphold the same and dismissed the appeal of the Revenue.

18. In the result, whereas the appeal of the assessee is allowed, Revenue's appeal is dismissed.

Order pronounced in the Open Court on March, 2019.

**SD/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

**sd/-
(K.NARASIMHA CHARY)
JUDICIAL MEMBER**

Dated: 22nd March, 2019.
VJ

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

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