

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

**BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
&
SHRI L.P. SAHU, ACCOUNTANT MEMBER**

**ITA No. 5822/Del/2015
Assessment Year: 2011-12**

Mr. Vinay Bhasin C-14, South Extension, Part-II, New Delhi. PAN No. AAAPB3445J	vs	JCIT Range-37 New Delhi.
APPELLANT		RESPONDENT

Assessee by	Sh. Salil Aggarwal, Adv. Sh. Shailesh Aggarwal
Revenue by	Sh. P.V. Gupta, Sr. DR

Date of Hearing	15.04.2019
Date of Pronouncement	23.04.2019

ORDER

PER SHRI BHAVNESH SAINI, J.M.

This appeal by assessee has been directed against the order of Ld.CIT(Appeals)-20, New Delhi dated 18.09.2015 for AY 2011-12.

2. We have heard Ld. Representatives of both the parties and perused the material available on record.

3. The facts of the case are that assessee is an Advocate. During the year under consideration, assessee derived income

from profession, house property, capital gains and other sources. The assessee filed return of income declaring income of Rs. 7,18,74,160/- which was processed u/s 143(1) of the Act. The case was selected for scrutiny. The AO after giving opportunity of being heard to the assessee made certain additions/disallowances to the tune of Rs. 20,37,664/- which was challenged before Ld. CIT(A). The Ld. CIT(A) partly allowed the appeal of assessee.

4. In the background of these facts, we proceed to decide the grounds of appeal as under:

1. *“That the Ld. CIT(Appeals) has grossly erred both in law and on facts in partially sustaining the additions/disallowances made by the Ld. Assistant Commissioner of Income Tax, since such additions/disallowances made are wholly unwarranted on facts and in law.*
2. *That the Ld. CIT(A) has grossly erred in sustaining the disallowance of interest debited in the profit and loss account of Rs. 1,42,376/-, failing to appreciate that aforesaid interest has been paid in respect of loan taken for the purchase of car, and such car has been used for the profession of the appellant and in respect of such car depreciation has also been allowed.*
 - 2.1 *That the Ld. CIT(A) has erred in failing to appreciate that Ld. ACIT has disallowed the aforesaid interest merely on the ground that appellant has given interest free loans of Rs. 1,16,25,000/- and advance for property of Rs. 1,60,04,301/- failing to appreciate that aforesaid advances has been made by the appellant out of available interest free fund of Rs. 24,89,60,889/- available with the assessee.*
 - 2.2 *That the Ld. CIT(A) has erred in failing to appreciate that loan has been taken for the purchase of car and it has not even been alleged in the order of assessment that aforesaid car loan has not been utilized for the*

- purchase of car, as such, disallowance made by the Ld. ACIT and sustained by the Ld. CIT(Appeals) deserves to be deleted.*
3. *That the Ld. CIT(A) has erred in sustaining the disallowance of Rs. 6,08,180/- failing to appreciate that aforesaid disallowance has been made mechanically applying the provisions of Rule 8D(2)(iii) of the Income Tax Rules, 1962 and without recording a satisfaction vis-à-vis books of the accounts of the assessee as envisaged under the provisions of Sub-sections (2) and (3) of section 14A of the Act and hence the disallowance made of Rs. 6,08,180/- is wholly unsustainable in law and deserves to be deleted.*
 - 3.1 *That the Ld. CIT(A) has erred in sustaining the disallowance failing to appreciate that while making the aforesaid disallowance Ld. ACIT has not established the nexus between the specific expenditure and the income which does not form part of the total income despite the fact that the appellant has specifically submitted that no expenditure has been earned for earning the exempt income.*
 4. *That the Ld. CIT(A) has erred in law and on facts by partially sustaining the adhoc disallowance of Rs. 2,00,538/- as again the disallowance originally made by Ld.AO of Rs. 2,50,674/- on account of telephone and vehicle expenses.*
 5. *That the Ld. CIT(A) has erred in law and on facts by partially sustaining the adhoc disallowance of Rs. 74,438/- as again the disallowance originally made by Ld. AO of Rs. 80,010/- on account of electricity and water expenses.*
 6. *That the Ld. CIT(A) has erred in law and on facts in disallowing the revenue expenditure claimed on account of upgradation/subscription of software amounting to Rs. 9,56,424/- and holding the same to be capital expenditure.*
 - 6.1 *That in doing so, the Ld. CIT(A) has failed to appreciate the judicial mandate of Hon'ble Jurisdictional High*

Court in the case of CIT vs. Asahi India Safety Glass Ltd. allowed as revenue expenditure.

- 6.2 *That the Ld. CIT(A) while sustaining the instant assessment has proceeded on irrelevant and extraneous considerations, by disregarding the submissions/material/evidence furnished by the assessee – appellant in shape of detailed replies and information's and as such, the addition so sustained, is wholly untenable on facts and also in law.*
 7. *That the Ld. CIT(A) has grossly erred in recording adverse findings which are perverse and have been recorded without considering the factual substratum of the case and hence such findings are vitiated and deserves to be deleted.*
 8. *That the Ld. CIT(A) has grossly erred in sustaining the assessment without providing to the assessee, a fair and proper and meaningful opportunity of being heard, thereby violating the principles of natural justice and thus such an order is vitiated both on fact and in law.”*
5. Ground no. 1 is general and need no adjudication.
6. On ground no. 2 assessee challenged the disallowance of interest of Rs. 1,42,376/-. The AO on perusal of the income and expenditure account of the assessee for the year under consideration noted that assessee has debited interest charges of Rs. 1,42,375.80 on account of car loan. Further, it was observed that assessee had advanced loans and advances to various parties including related parties and no interest is charged. The AO asked the assessee to explain why interest paid on loans should not be disallowed when the assessee was not charging any interest on loans or advances advanced by him to the other parties. The assessee submitted that he has made advances to various persons

as per list filed on record. The advances to Mr. Ritu Bhasin and Vinay Bhasin & Sons (HUF) are two family members and have been given out of his own capital. The assessee has not charged any interest from these blood relations. Otherwise also the assessee could have even gifted these amounts to them without incurring any tax liability. Advances of Rs. 6,22,000/- and Rs. 5 lakhs to Mr. Sandeep Sethi and Mr. N.P. Singh are against the purchase of properties. The deals of which could not be finalized during the year. The assessee has own substantial properties and is earning huge rental income. The AO, however, did not accept the contention of the assessee and noted that issue is same as has been decided in earlier AY 2009-10, accordingly, disallowed the amount in question i.e. Rs. 1,42,376/-.

7. The assessee challenged the addition before Ld. CIT(A). The assessee reiterated the submissions made before AO. It was also submitted that assessee has balance of capital of Rs. 24.90 crores approximately and further interest free funds of Rs. 50 lakhs are available, then, in any case, interest free funds given should be deemed to be out of capital balance and interest free funds available with the assessee. The assessee relied upon the judgment of Bombay High Court in the case of CIT vs. Reliance Utilities and Power Ltd. 178 taxman 135 etc. The Ld. CIT(A), however, confirm the addition and dismiss the appeal of the assessee.

8. After considering the rival submission, we are of the view that addition is wholly unjustified.

9. Ld. Counsel for assessee pointed out that the AO noted in the assessment order that issue is similar as has been considered in AY 2009-10. He has submitted that assessee preferred appeal before ITAT 'D' Bench in AY 2009-10 and appeal of assessee has been allowed on the similar ground, vide order dated 15.11.2018 in which the Tribunal in para 6 held as under:

“6. Ld. AR submitted that this car loan was the only interest-bearing loan that was taken by the assessee during the year and all the other funds are either interest free loans or the balance of capital account available with him. We find force in the submission of Ld. AR that the car loan of Rs. 50 lacs is no match against the amounts advanced during the year under consideration which are to the tune of Rs. 2.98 crores by the assessee. Further, it is not the case of the Ld. Assessing Officer that the car loan was diverted for any other purpose, because there is no denial of the statement of the assessee that the loan amount was directly disbursed to the seller of the car. Inasmuch as the loan was for the purpose of business and no question of diversion of such funds had taken place, merely because the assessee placed his own funds and also the interest free loans for some other purposes, is not open for the Ld. Assessing Officer to disallow the interest on the amount taken for business purpose. We, therefore, direct the Assessing Officer to delete this addition.”

10. Copy of the above order is provided to the Ld. DR who did not dispute the same.

11. In view of the above, it is clear that AO disallowed the interest because the issue is similar as has been considered in AY

2009-10. In AY 2009-10 the Tribunal deleted the similar additions. We, therefore, following the reasons for decision for AY 2009-10 (supra) found that issue is covered in favour of the assessee. We, accordingly, set aside the orders of the authorities below and delete the addition.

12. In the result, the ground no. 2 of appeal of assessee is allowed.

13. On ground no. 3 assessee challenged the disallowance of Rs. 6,08,180/- u/s 14A of the Act read with Rule 8D(2)(iii) of the Act. The AO noted that assessee has earned income exempt from tax amounting to Rs. 21,26,012/- from dividends. The assessee was asked to give details and justify the claim in view of section 14A read with Rule 8D with reference to the dividend income. The assessee submitted that he has not claimed any expenses against earning of the said income. Therefore, above provisions are not applicable in the case of the assessee. The assessee relied upon the following decisions:

1. *CIT vs. Wimco Seedlings - ITA No. 1367/2008, 1368/2008 & ITA No. 1391/2008;*
2. *ACIT vs. Sun Investments Pvt. Ltd. (2011) 48 SOT 159 (Delhi);*
3. *Relaxo Footwear Ltd. vs. Addl. CIT, Range-15, New Delhi (2012) 50 SOT 102 (Delhi)."*

14. The AO, however, noted that the basic object of section 14A is to disallow the direct and indirect expenditure incurred in relation to income which does not form part of the total income. AO referred to judgment of the Supreme Court in the case of CIT

vs Walfort Share and Stock Brokers P. Ltd. 326 ITR 1. The AO also noted that AO has to adopt a reasonable basis or method consistent with all the relevant facts and circumstances for making a disallowance. The assessee has not provided any separate amount for earning of exempt income. The assessee has made very heavy investments for earning exempt income throughout the year. The AO, therefore, following section 14A read with Rule 8D disallowed expenditure of Rs. 6,08,180/- which is attributed to the earning of exempt income.

15. The addition was challenged before Ld. CIT(A). The written submission of the assessee is reproduced in the appellate order in which it was stated that AO has not specified or pointed out any expenses, whatsoever claimed by assessee for earning the said dividend income. The assessee relied upon the decisions of Delhi High Court in the cases of CIT vs. Taikisha Engineering India Ltd. 275 CTR (Del.) 316 and Joint Investments (P) Ltd. vs. CIT 275 CTR 471. The Ld. CIT(A), however, confirm the addition and dismiss the appeal of assessee.

16. After considering the rival submissions, we are of the view that addition is wholly unjustified. Ld. Counsel for assessee submitted that similar issue was considered by ITAT Delhi 'D' Bench in the case of assessee for AY 2009-10 vide order dated 15.11.2018 (supra) and similar addition has been deleted. The findings of the Tribunal in para 8 of the order above is reproduced as under:

“8. We have gone through the findings of the Ld. Assessing Officer on this aspect. Ld. Assessing Officer recorded that the assessee made heavy investments for earning of exempt income and being a busy professional, he requires the management of such a portfolio by incurring expenses, diversion of man-power/staff for indulging in investment activities to various activities like visiting banks, use of vehicle and telephone, use of Internet if portfolio management is web-based, cost of computer and its depreciation, computer operator, consequent electricity, use of office premises, fee charged by mutual fund agents/bankers (annual fee), portfolio record maintenance and its tracking to ensure timely sale/purchase of mutual fund units etc. Except making this statement and reading all the possible expenses that involve in investment process, Ld. Assessing Officer is not specific as to what exactly the probable expenditure in this matter the assessee could have incurred. According to the assessee the investment was made in mutual funds and the expenses were already directed by the operators and a certificate to that extent was submitted before the Ld. Assessing Officer. Further, the instructions are that the dividend income will be directly credited to the bank account of the assessee so that no probable expenditure at the end of the assessee for deposit of the dividend in bank could have occurred. Having regard to this set of facts and circumstances involved in this matter, we are of the considered opinion that instead of making a sweeping enumeration of the probable expenses involved in investment process, Ld. Assessing Officer could have taken legal exercise to verify the correctness or otherwise of the certificate that was issued by the asset management companies or the Citibank in this respect. We, therefore, find that there is no proper record of satisfaction as to the expenses incurred by the assessee for earning the exempt income. By following the decision reported in CIT vs. Taikisha Engineering India Ltd. 275 CTR (Del.) 316 and Joint Investments (P) Ltd. vs. CIT 372 ITR 694 (Del.), we are of the opinion that the AO at the first

instance should have examined the correctness of the statement made by the assessee that no expenses were incurred for earning the exempt income during the year and if and only if the Ld. AO is not satisfied on this account after making reference to the accounts, he is entitled to adopt the method under Rule 8D of the Rules. We, therefore, while allowing the plea of the assessee direct the Ld. Assessing Officer to delete the addition made on this score also.”

Copy of the order is provided to the Ld. DR who did not dispute the same.

17. Considering the facts of the case, in the light of the findings of the Tribunal in AY 2009-10 (supra), we are of the view that issue is covered in favour of the assessee by above order of the Tribunal in the case of the same assessee. Following the reasons for the decision of the same, we set aside the orders of the authorities below and delete the addition.

18. Ground no. 3 of appeal of assessee is allowed.

19. On ground no. 4 assessee challenged the *ad hoc* disallowance of Rs. 2,00,538/- on account of telephone and vehicle expenses. The AO referred to audit report which stated that personal element of amount debited to the profit and loss account could not be ascertained. AO noted that assessee has claimed telephone and telex, vehicle running and maintenance expenses and depreciation on vehicle in profit and loss account. The total expenses are amounting to Rs. 20,05,388/-. The AO noted that the personal element of these expenses cannot be ruled out. Hence, 1/8th of

these expenses was disallowed u/s 37(1) being of personal nature. The AO, therefore, made addition of Rs. 2,50,674/-. The Ld. CIT(A) restricted the addition to 1/10th of the expenses claimed.

20. After considering the rival submission, we are of the view that the entire addition is wholly unjustified. The AO has not pointed out on which items personal element was involved in claiming the aforesaid expenses. AO has not pointed out any specific item which is used by the assessee for personal purposes. It is *ad hoc* addition made by the AO by disallowing 1/8th out of these expenditures. It is well settled law that *ad hoc* addition cannot be sustained unless AO has pointed out any specific item in which personal element is involved. There was thus, no justification to make any disallowance out of these expenditures. We, accordingly, set aside the orders of the authorities below and delete the entire addition.

21. Ground No. 4 of appeal of assessee is allowed.

22. On ground no. 5 assessee challenged the addition of Rs. 74,438/- on account of electricity and water expenses. The AO noted that assessee has furnished details of electricity and water expenses amounting to Rs. 2,40,029/-. The assessee has not apportioned the expenses having personal element in view of residence-cum-office nature of premises. The assessee has not installed separate electricity meter for residence and office. The assessee has also not shown such expenses in drawing account. As expenditure primarily relates to residential accommodation

(office cum residence), the AO consider it reasonable to disallow 1/3rd of electricity and water expenses. The AO, accordingly, made addition of Rs. 80,010/-. The assessee challenged the addition before Ld. CIT(A). The explanation of assessee is noted in the appellate order in which assessee submitted that complete details of these expenditures for office premises and residence-cum-office have been placed on record. The expenses are allowable. The assessee also pleaded that 1/3rd expenses of residence-cum-office at 109, Navjeevan Vihar, New Delhi may be disallowed. Further, the expenses of farm house may be fully disallowed. The assessee pleaded that security expenses of NDSE office are allowable.

23. Ld. CIT(A) considering the bills and explanation of the assessee partly allowed the claim of the assessee. The Ld.CIT(A), however, disallowed the following expenses:

1. Rs. 13,700/- on account of electricity and water for farm house at Satbari, Mehrauli.
2. Rs. 37,858/- were disallowed as 1/3rd of the electricity and water charges of residence-cum-office at Navjeevan Vihar, New Delhi.
3. Rs. 22,880/- were disallowed for residence at Panchsheel Park, New Delhi.

24. After considering the rival submission, we are of the view that no interference is called for in the matter. The assessee pleaded that bills of Satbari, Mehrauli Farm house may be disallowed which CIT(A) disallowed. The assessee also pleaded that 1/3rd of the expenses of residence-cum-office at Navjeevan

Vihar, Delhi may be disallowed which Ld. CIT(A) disallowed. The Ld. CIT(A) also disallowed electricity expenses of residence of the assessee for which Ld. Counsel for assessee could not make any submission as to why the disallowance was not justified. Considering the above findings of Ld. CIT(A) and in the absence of any challenge to the disallowances before CIT(A) as well, we do not find any justification to interfere with the order of Ld. CIT(A) in sustaining the part addition of Rs. 74,438/-. This ground is accordingly, dismissed.

25. On ground no. 6 assessee challenged the order of Ld. CIT(A) in disallowing the Revenue expenses claimed on account of up-gradation/subscription of software amounting to Rs. 9,56,424/-. The AO noted that assessee has debited Rs. 23,91,060/- as software expenses in income and expenditure account. The assessee explained that the assessee incurred software expenses during the year for upgrading integrated software at Chamber at Delhi High Court Office, South Extension Office-cum-residence. Further, the software of latest case laws, posting of judges, benches of various courts, database, appointment and transfer of judges, functioning of various benches, client's database had also been updated. These software are frequently updated and renewed and are not of an enduring nature or benefit. The AO, however, did not accept the contention of the assessee and considered the expenditure is of enduring nature. Therefore, after granting depreciation at 60% disallowed Rs. 9,56,424/-. The assessee challenged the addition before Ld. CIT(A), same

submissions were reiterated. The Ld.CIT(A), however, confirm the addition and dismiss the appeal of the assessee.

26. Ld. Counsel for assessee reiterated the submissions made before authorities below and submitted that expenses were incurred on account of upgradation/subscription of software which is not capital in nature. He has relied upon the judgment of the Delhi High Court in the case of CIT vs. Asahi India Safety glass Ltd. 346 ITR 329 in which it was held as under:

“Software is nothing but another word for computer programmes, i.e. instructions that make the hardware work. Software is broadly of two types, i.e. the systems software, which is also known as the operating system which controls the working of the computer; while the other being applications such as word processing programs, spread sheets and database which perform the tasks for which people use computers. Beside these, there are two other categories of software, these being; network software and language software. The network software enables groups of computers to communicate with each other, while language software provides with tools required to write programmes.

The aforesaid would show that what the assessee acquired through A was an application software which enabled it to execute tasks in the field of accounting, purchases and inventory maintenance. The fact that the application software would have to be updated from time to time based on the requirements of the assessee in the context of the advancement of its business and/or its diversification, if any; the changes brought about due to statutory amendments by law or by professional bodies like the Institute of Chartered Accountants of India, which are given the responsibility of conceiving and formulating the accounting standards from time to time, and perhaps also, by reason of the fact that expenses may have to be

incurred on account of corruption of the software due to unintended or intended ingress into the system ought not give a colour to the expenditure incurred as one expended on capital account. Given the fact that there are myriad factors which may call for expenses to be incurred in the field of software applications, it cannot be said that either the extent of the expense or the expense being incurred in close proximity, in the subsequent years, would be conclusively determinative of its nature. The Assessing Officer has erred precisely for these very reasons.”

27. He has also relied upon the judgment of Delhi High Court in the case of CIT vs. Amway India Enterprises 346 ITR 341 (Delhi) in which it was held as under:

“IT : Expenditure on purchase of software application is revenue expenditure.”

28. Ld. Counsel for assessee also referred to details of software expenses which are bills, copies of the same are filed at pages 48 to 52 of the Paper Book. Ld. Counsel for assessee submitted that the authorities below have failed to appreciate the contents of the bills which show that expenses have been incurred for upgradation of the software only. The authorities below have failed to consider the terminology used in the aforesaid bills.

29. Ld. DR, however, relied upon the orders of the authorities below.

30. After considering the rival submissions, we are of the view that matter requires reconsideration at the level of the AO. The AO has not pointed out as to which capital has been generated out of the aforesaid expenses incurred by the assessee for the purpose

of profession of the assessee. AO has also not pointed out that after incurring the expenditure how the same could be considered enduring in nature. Ld. Counsel for assessee pointed out the details noted in the bills/vouchers of these expenses shows that the matter requires reconsideration at the level of the AO. We, accordingly, set aside the orders of the authorities below and restore this issue to the file of AO with direction to re-decide the issue after giving an opportunity of being heard to the assessee, after verifying the bills and vouchers produced on this issue. This ground is allowed for statistical purposes.

31. In the result, the appeal of assessee is partly allowed.

Order pronounced in the open Court.

Sd/-
(L.P. SAHU)
ACCOUNTANT MEMBER
Dated: 23/04/2019
*Kavita Arora

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Copy forwarded to:

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

TRUE COPY

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	16/04/2019
Date on which the typed draft is placed before the dictating Member	18/04/19 23.04.19
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	23.4.19
Date on which the fair order comes back to the Sr. PS/PS	23.4.19
Date on which the final order is uploaded on the website of ITAT	23.4.19
Date on which the file goes to the Bench Clerk	23.4.19
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	