आयकर अपीलीय अधिकरण,चण्डीगढ़ न्यायपीठ "बी", चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH BENCH "B", CHANDIGARH

श्री संजय गर्ग, न्यायिक सदस्य एवं डा. बी.आर.आर, कुमार, लेखा सदस्य
BEFORE: SH.SANJAY GARG, JUDICIAL MEMBER & DR. B.R.R. KUMAR, ACCOUNTANT MEMBER

आयकर अपील सं./ ITA No. 800/Chd/2018
निर्धारण वर्ष / Assessment Year : 2013-14

The DCIT, C-1 Circle 1, Ludhiana Punjab	बनाम	M/s Rico Auto Industries Ltd. B-26, Focal Point Ludhiana, Punjab
स्थायी लेखा सं./PAN No: AAACR8724R		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by : Shri. Vipin Gupta
राजस्व की ओर से/ Revenue by : Smt. Renu Amitabh, CIT DR

सुनवाई की तारीख/Date of Hearing: 14/02/2019
उदघोषणा की तारीख/Date of Pronouncement : 02/05/2019

आदेश/Order

PER DR. B.R.R. KUMAR, A.M:

The present appeal has been filed by the Revenue against the order of the Ld. CIT(A)-1, Ludhiana dt. 23/03/2018.

2. Revenue has raised the following grounds of appeal:

1. Whether upon facts and circumstances of the case, the Ld. CIT(A) was justified in law and on facts in directing the AO to re-calculate the addition made on account of disallowance u/s. 14A of the Income Tax Act, 1961 by applying the amended provisions of Rule 8D(2)(ii) @1% of the annual average of monthly average of the opening and closing balances of the value of investments, whereas the same amendment was introduced w.e.f. 02.06.2016 and does not have retrospective effect?

2. Whether upon facts and circumstances of the case, the Ld. CIT(A) was justified in law and on facts in allowing the disallowance u/s. 14A of the Income Tax Act, 1961 voluntarily made by the assessee at the time of filing of return of income based on observation of auditors, who, themselves on close perusal of the books and investments of the assessee were convinced that disallowance u/s. 14A is called for the tune of Rs. 3.55 crore?

3. Whether upon facts and circumstances of the case, the Ld. CIT(A) was justified in law and on facts in allowing the voluntary disallowance u/s. 14A of the Income Tax Act, 1961 made by the assessee at the time of filing of return of income, ignoring the decision of the Hon'ble Supreme Court in the case of Goetze (India) Ltd., Vs. CIT [2006; 284 ITR 323], wherein it was categorically held that the AO cannot entertain claim of deduction otherwise than by filing of the revised return by the appellant?

4. Whether upon facts and circumstances of the case, the Ld. CIT(A) was justified in law and on facts in allowing relief on account of capitalization of interest as per proviso to section 36(l)(iii) of the Income Tax Act, 1961 on investment in shares of domestic companies and capital advance for purchase of land and other advances despite the fact that Share Capital and Reserves and Surplus were already exhausted by the assessee in fixed assets?

5. That the order of the Ld. CIT (A) be set aside and that of the Assessing Officer be restored.

3. The detailed facts of the case taken from the order of the Ld.CIT(A).

4. The assessee company had made investments to the tune of Rs.74.89 crores in the equity of domestic group companies, some of which investments yielded exempt dividend income of Rs.2,96,24,955/-. It was also noted by the AO that the assessee company had significant amount of borrowed funds which were almost similar to the assessee's own non-interest-bearing funds. The assessee itself computed the disallowance at Rs.3,35,66,806/- under section 14A read with Rule 8D and added the same to its returned income. No further disallowance was, therefore, made by the AO. In the appellate proceedings, it was first contended that the voluntary disallowance of Rs.3,35,66,806/- was an inadvertent mistake on the part of the assessee company, which should not be taken into account as no amount of disallowance is required in the circumstances of the assessee's case where investments were made out of own non-interest-bearing funds and regular cash profits of the company without any part of the borrowed funds having been used for such investments. Various judicial precedents were cited in support of the aforesaid proposition of no disallowance where interest bearing funds have not been utilized for making investments. The AO was also alleged to have ignored the judicially ordained calculation of disallowance by considering all investments even if such investments have not yielded exempt income [ITAT Chandigarh Bench in the case of M/s Ramtech Software Solutions Pvt. Ltd. in ITA No. 477/2015 dated 14/08/2015]. The assessee has, admittedly, earned exempt income during the year under consideration and the outlay in terms of interest on borrowed capital is also a fact on record. There is no doubt about the unity of control and commonality of funds and management in relation to the "business activity" and "investment activity, income from which does not or shall not form part of the total income". Since no direct expenses are purported to have been made by the assessee company in acquiring the investments or noticed by the AO, no disallowance has been made under Rule 8D (2) (i). To take care of a situation where there is a mixed use of borrowed funds, apportionment of interest expenditure is mandated as per the provisions of Rule 8D, which stands

substituted by the IT (14th Amdt.) Rules, 2016, w.e.f. 02/06/2016. The said Rule provides that the expenditure in relation to income which does not form part of the total income shall be the aggregate following amounts, namely: (i) the amount of expenditure directly relating to income which does not form part of total income; and (ii) an amount equal to one percent of the annual average of the monthly averages of the opening and closing balances of the value of investment, income from which does not or shall not form part of total income, provided that the amount referred to in clause (i) & clause (ii) shall not exceed the total expenditure claimed by the assessee. This amendment to the mechanism of calculating disallowance under the provisions of section 14A, particularly the merger of the erstwhile Rule 8D (2) (ii) & (iii) into Rule 8D (ii) specifying the proportionate disallowance @ 1%, is undoubtedly, meant for taking care of a situation where there is a mixed use of borrowed funds and non-interest-bearing funds and consequently apportionment of expenditure is well-nigh impossible. If the said provision is interpreted in a way to mean that only expenses directly related to earning dividend income or exempt income are to be disallowed and expenses of the nature of interest on borrowings which are not directly attributable to any particular income on receipt are not covered, it would only make the provision of Rule 8D (2) (ii) otiose and redundant. Such an interpretation cannot be considered to be based on purposive construction of the Rule. It is judicially well settled that Rules are procedural law and are applicable to the proceedings, which are pending as on date. The aforesaid amended provisions of Rule 8D have been made effective from 02/06/2016 and, therefore, its applicability in the instant case is necessarily implied. It clearly indicates that the applicability of the amended Rules are not referable to either the financial year or the assessment year. Making it effective from 2nd of June, 2016 means that the amended provisions shall be applicable to all pending proceedings of assessment or appeal as on 2nd of June, 2016. A distinction can be drawn between enactments that have substantive effect and those that are merely procedural. Here substantive means having to do with the substance of the law, in particular the nature and existence of legal rights, power or duties, whereas procedure is concerned with formalities and technicalities, rather than substance. A procedural change is expected to improve matters for everyone concerned, without inflicting detriment or impairing the vested rights. As stated earlier, the amendment to the Rule 8D has been made only to uncomplicated and settle the issue of apportionment of expenses towards taxable and non-taxable income, which

was turning into a widely contested and litigious issue. Accordingly, it is held that disallowance under the provisions of section 14A has to be computed in accordance with the provisions of Rule 8D (2) (ii) @ 1% of the annual average of monthly averages of the opening and closing balances of the value of investments. However, while undertaking the aforesaid calculation, the AO shall account for only those investments which have yielded exempt income during the year. In terms of the aforesaid, the AO is directed to re-compute the disallowance for addition to the returned income. It is seen that the assessee had itself added back an amount of Rs.3,35,66,806/- as disallowance under the provisions of section 14A. However, it was claimed before the AO that such voluntary disallowance was inadvertently made and that there was no requirement of the said disallowance in view of the judicial precedents which are unanimous in holding that if investments have been made out of own and non-interest-bearing funds, disallowance would not be necessary. The AO refused to entertain the said plea of the assessee at the assessment stage by relying upon the decision of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. Vs. CIT [2006; 284 ITR 323] wherein it was categorically held that the AO cannot entertain claim of deduction otherwise than by filing of the revised return by the assessee. In the appellate proceedings, the assessee placed reliance on the decision of the Hon'ble Supreme Court in the case of Jute Corporation of India Limited [1991; 187 ITR 688] in which it has been held that an assessee is entitled to raise not merely additional legal submissions before the appellate authorities but is also entitled to raise additional claims before them. Support for this proposition was also sought from the decision of the Bombay High Court in the case of Commissioner of Income Tax, Central-1, Mumbai Vs. Pruthvi Brokers and Shareholders [2012; 349 ITR 336] wherein it was held that the appellate authorities are entitled to exercise their jurisdiction to consider the additional claim in view of the various judgments on the issue including the judgment of the Supreme Court in the case of National Thermal Power Corporation Ltd. [1998; 229 ITR 383]. Considered in this backdrop, it is held that the assessee cannot be made to suffer an inadvertent mistake made at the time of making of return and more so when a new mechanism of disallowance under the provisions of section 14A read with Rule 8D is being enforced, as has been done in the instant case herein above. Needless to say that the voluntary disallowance of Rs.3,35,66,806/- purported to have been made inadvertently by the assessee needs to be neutralised by reducing the assessed income by the

said amount before adding back the recomputed disallowance as indicated above. It is ordered accordingly.

5. Aggrieved, the Revenue filed an appeal before us which are interlinked to each other.

1) Whether the CIT(A) is right in giving benefit of the amount of tax which the assessee has voluntarily paid ?

2) Whether the CIT(A) is right in entertaining the plea of the assessee against the judgment of in the case of Goetze (India) Ltd.

3) Whether the CIT(A) is right in interpreting the amendment introduced w.e.f 02/06/2016 prospectively.

Before us, both the representatives relied on the arguments taken before the lower authorities. Paper book containing 109 pages constituting the case laws has been filed.

6. We have gone through the facts of the case. The Hon'ble Supreme Court in the case of Goetze (India) Ltd. 284 ITR 323 held as under:

> *3.This assessee's appeal before the Commissioner (Appeals) was allowed. However, the order of the further appeal of the department before the Income Tax Appellate Tribunal was allowed. The assessee has approached this court and has submitted that the Tribunal was wrong in upholding the assessing officer's order. He has relied upon the decision of this court in National Thermal Power Company Ltd. v. CIT (1998) 229 ITR 383, to contend that it was open to the assessee to raise the points of law even before the Appellate Tribunal.*
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> *4. The decision in question is that the power of the Tribunal under section 254 of the Income Tax Act, 1961, is to entertain for the first time a point of law provided the fact on the basis of which the issue of law can be raised before the Tribunal. The decision does not in any way relate to the power of the assessing officer to entertain a claim for deduction otherwise than by filing a revised return. In the circumstances of the case, we dismiss the civil appeal. However, we make it clear that the issue in this case is limited to the power of the assessing authority and does not impinge on the power of the Income Tax Appellate Tribunal under section 254 of the Income Tax Act, 1961. There shall be no order as to costs.*

Further in the case of Prithvi Brokers & Share Holders 349 ITR 336 the Hon'ble Bombay High Court held that :

> It *is well settled that an assessee is entitled to raise not merely additional legal submissions before the appellate authorities, but is also entitled to raise additional claims before them. The appellate authorities have the discretion whether or not to permit such additional claims to be raised. It cannot, however, be said that they have no jurisdiction to consider the same. That they may choose not to exercise their jurisdiction in a given case is another matter. The exercise of discretion is entirely different from the existence of jurisdiction. Goetze was confined to a case where the claim was made only before the AO and not before the appellate authorities. The Court did not lay down that a claim not made before the AO cannot be made before the appellate authorities. The*

> *jurisdiction of the appellate authorities to entertain such a claim has not been negated by the Supreme Court in this judgment. On facts, there was nothing to show that the claim entertained by the CIT (A)/ ITAT was improper*

Similarly in the case of NTPC 229 ITR 383 the Hon'ble Supreme Court held as under:

> *6. In the case of Jute Corporation of India Ltd. v. C.I.T. . this Court, while dealing with the powers of the Appellate Assistant Commissioner observed that an appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the absence of any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. There is no good reason to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income-tax Officer. This Court further observed that there may be several factors justifying the raising of a new plea in an appeal and each case has to be considered on its own facts. The Appellate Assistant Commissioner must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The Appellate Assistant Commissioner should exercise his discretion in permitting or not permitting the assessee to raise an additional ground in accordance with law and reason. The same observations would apply to appeals before the Tribunal also.*
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> *7. The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner of Income-tax (Appeals) takes too narrow a view of the powers of the Appellate Tribunal [vide, e.g., C.I.T, v. Anand Prasad (Delhi), C.I.T. v. Karamchand Premchand P. Ltd. and C.I.T. v. Cellulose Products of India Ltd. . Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings we fail to see why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.*

The crux of the judgments referred above is that

a) The appellate authorities are entitled to exercise their jurisdiction to consider the additional claim.

b) The assessee cannot be made to suffer inadvertent mistake made at the time of filing of the return i.e; in case the assessee pays the tax which is not required to pay as per the Act, he can always reclaim the amount.

Owing to the above interpretation, we hold that the Ld. CIT(A) acted in a judicious manner and hence we decline to interfere with the order of the Ld.CIT(A) on these issues.

6. Regarding issue no.(3)above- the applicability of amendment to Section 14A from 02/06/2016,we are the view that due to the fact that there is a specific date mentioned regarding the applicability of the amended provisions hence the same cannot be said to be retrospective. The Assessing Officer is directed to compute the disallowance as per the rules applicable as on the date.

Regarding the ruling that the Assessing Officer shall account on the those investments which have yielded exempt income, we find strength by the orders of the special Bench of ITAT in the case of Vreet Investment Pvt. Ltd. 188 TTJ 001 (Del-Trib.) and also the order in the case of Prime Property Development Corp Pvt. Ltd. in ITA No. 7402/Mum/2016 dt. 16.11.2017. We direct the Assessing Officer to compute the disallowance accordingly .

7. Regarding the ground raised pertaining to capitalization of interest under section 36(1)(iii) we find that the assessee's own resources are to the tune of 321.17 Crores which shows the sufficiency of interest free funds to meet the expenses. We rely on the judgments in the assessee's own case in ITA No. 1093/CHD/2014 and ITA No. 3 2015 dt. 22/11/2016, wherein the judgment of Hon'ble Jurisdictional High Court in the case of Abhishek Industries 268 ITR 1 which was referred by the Assessing Officer in his order has been distinguished. Further in the case of Bright Enterprises in ITA No. 224 of 2013 dt. 24/07/2015 the Hon'ble High Court of Punjab & Haryana clearly held that if interest free funds are available the a presumption would arise that the investments would be out of interest free fund generated or available with the company. Hence no disallowance under section 36(1)(iii) is called for. The order of the Ld. CIT(A) on this ground is confirmed.

9. As a result, the appeal of the Revenue is treated as partly allowed for statistical purpose.

Sd/-	Sd/-
संजय गर्ग / (SANJAY GARG)	**डा. बी.आर.आर, कुमार / (DR. B.R.R. KUMAR)**
न्यायिक सदस्य/ Judicial Member	**लेखा सदस्य/ Accountant Member**

Date: 02/05/2019
AG

Copy of the order forwarded to :

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2. The Respondent
3. CIT,
4. DR, ITAT, CHANDIGARH,
5. Guard File