

IN THE INCOME-TAX APPELLATE TRIBUNAL "I" BENCH MUMBAI
BEFORE SHRI G.S. PANNU, VICE-PRESIDENT AND
SHRI PAWAN SINGH, JUDICIAL MEMBER
ITA No. 2254/Mum/2011 (Assessment Year 2007-08)

Stock Traders Private Ltd. 63, Bombay Samachar Marg, Fort, Mumbai-400001. PAN: AAACS7235A	Vs.	ACIT (OSD)-2(3) Aayakar Bhavan, M.K. Road, Mumbai-400020.
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Appellant

Respondent

Appellant by : Shri Nitesh Joshi (AR)
Respondent by : Shri Nishant Somaiya (Sr. DR)
Date of Hearing : 03.04.2019
Date of Pronouncement : 12.04.2019

ORDER UNDER SECTION 254(1) OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. This appeal by assessee is directed against the order of Id. Commissioner of Income-tax (Appeals)-6 [hereinafter referred as Id CIT (A)], Mumbai dated 12.01.2011 for Assessment Year 2007-08. The assessee has raised the following grounds of appeal:

Aggrieved by the order passed by the Commissioner of Income-tax (Appeals) - 6, Mumbai [hereinafter referred to as 'the CIT(A)'], under section 250 of the Income-tax Act, 1961 ('Act') and based on the facts and circumstances of the case and in law, Stock Traders Private Limited [hereinafter referred to as 'the Appellant'] respectfully submits that the learned CIT(A) erred in disposing the appeal of the Appellant, on the following grounds:

Reclassification of interest income as income from other sources

1. erred in confirming the reclassification of interest income of Rs 96,90,280 under the head Income from Other Sources instead of Income from Profits and Gains of Business and Profession;

2. Without prejudice to above, should have given directions to grant deduction of expenses under section 57 of the Act:

Disallowance of professional fees paid

3. erred in confirming disallowance of professional fees expenditure of Rs 3,98,12,647 paid to Preroy AG ('PAG');

Disallowance of foreign travelling expenses

4. erred in confirming disallowance of foreign air travel expenses amounting to Rs 10,84,994 in respect of the foreign travel undertaken by the wife of the director;

Disallowance of professional fees paid to Ernst and Young

5. erred in confirming disallowance of Professional fees paid to Ernst and Young of Rs 7,18,336 in connection with sale of stake in Feedback ventures, claimed as a deduction from income under the head 'Capital Gains' being incurred towards transfer of shares;

Disallowance of car hire charges

6. erred in confirming disallowance of car hire charges of Rs 50,000 paid to Autoriders International Ltd on account of non-deduction of tax at source;

Disallowance under section 14A

7. erred in directing the AO to re-compute the disallowance of expenditure under section 14A of the Act on a reasonable basis, instead of deleting the same as no expenditure are incurred to earn tax free income;

2. Further, vide application dated 04.12.2018, the assessee has raised the following additional grounds of appeal:

On the facts and in the circumstances of the case and in law, the Appellant prays that the disallowance under section 14A of the Act, if held to be applicable, may be made only in respect of those investments which have yielded dividend income during the year under consideration and the disallowance may be restricted to 0.5% of the average value of such investments.

Without prejudice to the above additional ground, the Appellant prays that the disallowance under section 14A of the Act, if held to be applicable, may

be restricted to the exempt income earned during the year under consideration.

3. Brief facts of the case are that the assessee is a company engaged in the business of financing and investing in various ventures, filed its return of income for Assessment Year 2007-08 declaring income Nil income after setting off of unabsorbed depreciation. The return of income was selected for scrutiny. The assessment was completed under section 143(3) on 17.12.2009. The Assessing Officer while passing the assessment order treated the interest income of Rs. 96,90,280/- as "Income From Other Sources" instead of Income from 'Profit & Gains of Business and Profession', disallowed professional fees of Rs. 3,98,12,647/-, disallowed Rs. 10,84,994/- on account of foreign travelling expenses of wife of Director, disallowed Rs. 7,18,336/- professional fees paid to Earnest and Young (E&Y), disallowed Car hire expenses of Rs. 50,000/- due to non-deduction of TDS and disallowance under section 14A of Rs. 7,08,369/-. On appeal before the Id. CIT(A), all the additions/disallowance were upheld. Thus, further aggrieved by the order of Id. CIT (A), the assessee has filed the present appeal before us.
4. We have heard the rival submission of Id. Authorized Representative (AR) of the assessee and Id. Departmental Representative (DR) for the revenue and have gone through the orders of authorities below. The Id. AR of the assessee submits that he has raised the additional ground of appeal with regard to disallowance under section 14A. The Id. AR of the

assessee further submits that no new facts is required to be brought on record for additional grounds of appeal raised by assessee. The facts are emanating from the order of authorities below.

5. On the other hand, the ld. DR for the revenue not seriously objected the additional grounds of appeal raised by assessee. Considering the submission of ld. AR of the assessee that no new facts are brought on record and that the facts related to the additional ground of appeal are emanating from the orders of lower authorities, the additional ground of appeal raised by assessee is allowed. Even otherwise the additional grounds of appeal relates to the disallowance under section 14A and the assessee has already raised substantial ground to this disallowance vide Ground No.7. Therefore, the additional grounds of appeal would be taken along with the ground No.7.
6. Now, we shall proceed to discuss the main grounds of appeal. Ground No.1 relates to treating the interest income of Rs. 96.90 Lakhs under the head “Income from Other Sources” instead of “Income from Profit & Gains of Business & Profession”. The ld. AR submits that two year prior to the Assessment Year under consideration and two years subsequent to this year, the assessment order was passed under section 143(3) and the Interest Income was accepted/ allowed as income from “Business and profession” to the assessee. The ld. AR of the assessee filed the copy of Assessment Year 2005-06 dated 23.12.2009, Assessment Year 2006-07

dated 01.12.2008, Assessment Year 2008-09 dated 13.12.2011 and Assessment Year 2009-10 dated 11.11.2011, the Id AR also drawn our attention to the profit and loss account of the assessee for all the years wherein the Interest Income was accepted as “Business and professions”. The Id. AR of the assessee further submits that on same set of fact when there was no material change in the facts, the revenue should accept the Interest Income as ‘Business Income’ on the principle of consistency. In support of his submission, the Id. AR relied upon the decision of Hon’ble Bombay High Court in case of CIT vs. Gopal Purohit ITA No. 1121/2009 dated 06.01.2010 [2010] 228 CTR (Bom) 582].

7. On the other hand, the Id. DR for the revenue submits that every year is separate and independent year. The principal of res-judicata is not applicable on the income tax proceedings. The Id. CIT(A) has brought out the difference for the year under consideration. The Id. DR further submits that case law relied by Id. AR in Gopal Purohit (supra) is not applicable on the facts of the present case.
8. We have considered the submission of the parties and have gone through the orders of authorities below. The Assessing Officer during the assessment noted that assessee has charged interest only in respect of single loan given by the assessee. The assessee was asked to substantiate whether if the money has been advanced free of interest and also to furnish the evidence that business purpose for which such advance was

given. The assessee filed its reply dated 15.09.2009. In the reply, the assessee contended that the assessee is non-banking financial company (NBFC) registered with Reserve Bank of India (RBI) and it had advanced loan to its subsidiary, joint venture, group entities and had not charged interest to certain subsidiaries. The assessee also contended that routine loan advanced to sister concern does not constitute a business of non-banking financial company which was given in accordance with consistent rules and terms and conditions. The loan lending to select few group companies but outsider customer as well. The contention of assessee was not accepted by Assessing Officer. The Assessing Officer concluded that the assessee's status of non-banking financial company is only on paper. The assessee has advanced the loan as per its convenience which cannot make it a business activity. The Assessing Officer treated the said interest income as "Income from Other Sources" in place of "income from business and professions". The ld. CIT(A) concurred the finding of the assessing officer observing that the assessee-company advanced loan of more than Rs. 16 Crore on which no interest has been charged. The assessee has charged interest only from one group of companies. The ld. CIT(A) concluded that there is merit in the finding of Assessing Officer that the assessee is not in the business of making loans and advances and the assessing officer correctly assessed its interest income under the head "Income from Other Sources".

9. The Id. AR of the assessee vehemently submitted that for two preceding year for Assessment Year 2005-06 & 2006-07 and two subsequent year i.e. for Assessment Year 2008-09 & 2009-10, the interest income of assessee was accepted by revenue as 'Business Income'. The Id. AR of the assessee also placed on record the assessment order passed under section 143(3) for four Assessment Years. We have also noted that only for the year under consideration, the interest income of assessee was treated as 'Income from Other Sources'. There is no dispute that assessee is registered as a non-banking financial company with registered with RBI. The Assessing Officer has not disputed the business activities of the assessee except holding that assessee is a non-banking financial company (NBFC) only on papers. The assessing officer has not brought any material on record to show that the assessee is NBFC only on papers.
10. The Hon'ble jurisdictional High Court in CIT vs. Gopal Purohit (supra) held that there should be uniformity in treatment and consistency when the facts and circumstances are identical particularly in assessee's own case and when the revenue did not furnish any justification for adopting a divergent approach for the Assessment Year in question. The assessing officer has not brought any material on record to differentiate the facts of the year under consideration with the earlier year. We have further noted that the Id CIT(A) confirmed the action of assessing officer vide its order

dated 12.01.2011. However, the assessing officer allowed the interest income for assessment year 2008-09 as income from “business and profession” in assessment order dated 13.12.2011 and for assessment year 2009-10, vide assessment order dated 11.11.2011 passed under section 143(3). The ld DR has not brought any facts to our notice that the revenue has reverse the treatment of the same income by revising the order under section 263 of making re-opening of those assessment orders for subsequent years. Therefore, respectfully following the decision of Hon’ble jurisdictional High Court in Gopal Purohit (supra), we direct the Assessing Officer to allow the Interest Income earned by assessee as “Income from business”.

11. In the result, ground no.1 of the appeal is allowed.
12. Ground No.2 relates to granting deduction of expenses under section 57 of the Act. We have noted that this ground of appeal is in alternative to the ground no.1 of the appeal, which we have allowed, therefore, the discussion on this ground of appeal have become academic.
13. Ground No.3 relates to disallowance of Professional Fees and Ground No.4 relates to Foreign Air Travel Expenses of wife of Director amounting to Rs 10,84,994. The ld. AR of the assessee fairly submitted that these grounds of appeal are covered against the assessee by the decision of Tribunal in assessee’s own case for Assessment Year 1995-96, 1996-97, 1997-98 in ITA No. 2802, 2803, 2804/Mum/2003 dated

05.04.2016. The Id. DR also confirmed that these grounds of appeal are covered against the assessee and should be dismissed. Considering the submission of Id. AR of the assessee, these grounds of appeal are also dismissed by following the decision of the Tribunal for earlier years as submitted by Id. AR for the assessee.

14. Ground No.5 relates to disallowance of professional fees. The Id. AR of the assessee submits that the assessee incurred expenses for taking advice for validity of sales by STPL to DLF as mutually agreed between the parties. The assessee incurred expenses wholly and exclusively for the purpose of business. The Id. AR of the assessee further submits that invoices of the expenditure are filed as per page no.334 & 335 of the Paper Book. In alternative, the Id. AR of the assessee submits that it should be allowed as business expenses.

15. On the other hand, the Id. DR for revenue supported the order of Id. CIT(A). The Id. DR submits that the assessee has offered the income from sale of share under the head 'Capital Gain', therefore, the expenses paid to E& Y cannot be allowed under the head 'Business Income'. The letter written by E&Y dated 11.08.2006 clearly states that the said fee was paid on account of merger and acquisition and paid for advisory services.

16. We have considered the rival submission of the parties and have gone through the orders of authorities below. The Assessing Officer

disallowed the expenses holding that the income pertaining to the sale of shares is offered under the head 'Capital Gain', the expenditure incurred by assessee on taking advice for sale cannot be allowed under the head 'Business Income', since the same cannot be treated as expenditure incurred for the purpose of business. The Id. CIT(A) confirmed the action of Assessing Officer holding that in the letter dated 11.08.2006 by E&Y to the Board of Director of Feedback Ventures Pvt. Ltd. filed during the appellate proceeding also states that the fees was paid to E&Y related to the merger and acquisition of advisory services.

17. We have noted that genuineness of payment is not disputed by the lower authorities. The lower authorities disallowed the deduction of professional fees on the ground that it was incurred for taking advisory services for merger and acquisition of advisory services. In our view once the genuineness of advisory fees is not disputed by the revenue, the Assessing Officer is not justified in disallowing on the ground that it was incurred under the head 'Capital Gain', without specifying that the same expenses were claimed or not by assessee under that head of income. Therefore, considering the facts of the case, we direct the Assessing Officer to allow the professional fees paid to E & Y, after verification of the fact that it was not claimed as a deduction of cost under the head 'Capital Gain'.

18. In the result, this ground of appeal is allowed.

19. Ground No.6 relates to Car Hire Charges. The ld. AR of the assessee submits that the assessee was not liable to deduct TDS as the amount was less than Rs. 1.20 Lakhs as the provisions of section 194C is not applicable, rather section 194I is applicable. In support of his submission, the ld. AR of the assessee relied upon the decision reported in Three Star Granites (P.) Ltd. vs. ACIT [266 CTR 326 (Kerala)].
20. On the other hand, the ld. DR for the revenue supported the order of lower authorities. The ld. DR of the revenue further submits that section 194-C is applicable and not the section 194I.
21. We have considered the submission of the parties and have gone through the orders of authorities below. The Assessing Officer discussed the ground of appeal that disallowance of Car Hire Charges in para-6.1 of the assessment order. The Assessing Officer noted that the assessee paid Travelling Expenses of Rs. 51,301/- as Car Hire Charges to Auto Riders International Ltd. The Assessing Officer further noted that no TDS was paid on such payment. The Assessing Officer took the view that the said exceed Rs. 50,000/- and disallowed by applying the provision of section 40(a)(ia). The ld. CIT(A) confirmed the action of Assessing Officer holding that this is a case of contract for hiring of cars and provision of section 194C are clearly applicable. The hiring of Car cannot be held to the rent to which the provision of section 194-I would apply.

22. We have noted that the Hon'ble Kerala High Court in Three Star Granites (P.) Ltd. (supra) held that when the assessee entered into agreement that a contractor for hiring the vehicles and made use of vehicles and equipment and paid hire charges of number of hours under section 194-I would be attracted and not section 194C. We have further noted that the assessee had paid only a sum of Rs. 51,030/- during the year on account of Car Hiring Charges. Therefore, respectfully following the decision of Hon'ble Kerala High Court in Three Star Granites (P.) Ltd. (supra) wherein it was held that for use of vehicle and equipment and paid hire charges on the basis of number of hours of use section 194-I is applicable, therefore, respectfully following the said decision, the Assessing Officer directed to delete the disallowance.
23. Ground No.7 and the additional grounds of appeal relate to disallowance under section 14A. The Id. AR of the assessee submits that during the year under consideration, the assessee earned exempt income of Rs. 6,13,789/- as dividend from equity share/mutual fund. The assessee incurred no expenditure relating for earning the said exempt income. The Id. AR of the assessee submits that disallowance under section 14A may be restricted to the investment which yielded exempt income. In alternative the Id. AR submits that the disallowances may be restricted to .5% of the investment which yielded the exempt income during the year.

24. On the other hand, the Id. DR for the revenue supported the order of lower authorities.
25. We have considered the submission of both the parties and have gone through the orders of authorities below. We have noted that during the relevant period under consideration, the assessee has shown to have earned exempt income of Rs. 6,13,789/-. The assessee has not offered any suo-moto disallowance under section 14A. The Assessing Officer issued a show-cause notice to the assessee as to why the expenditure incurred in relation to the exempt income be not determined in accordance with the provision of Rule 8D. The assessee filed its reply dated 15.09.2009. In the reply, the assessee contended that no expenditure has been incurred in relation to the earning of such dividend income. The assessee does not have borrowed on which any interest payments were made. The investment in mutual fund based on pre-determined criteria and not over head expenditure including indirect cannot said to be incurred for earning such dividend income. The contention of assessee was not accepted by Assessing Officer. The Assessing Officer invoked the provisions of Rule 8D and made disallowance under Rule 8D(2)(iii) of Rs. 7,08,369/-. The Assessing Officer worked out the disallowance on the basis of .5% of average value of investment. The Assessing Officer disallowed .5% of Rs. 14,16,73,804/-.

26. We have noted that Rule 8D is not applicable for the Assessment Year under consideration. The Special Bench of Delhi Tribunal in ACIT Vs Vireet Investment (P) ltd [2017] 82 taxmann.com 415 (SB Delhi Trib) held that only those investment which have yielded dividend income during the year under consideration be considered for disallowance under section 14A. Therefore, considering the submission of the assessee and the decision of Special Bench of Delhi Tribunal in Vireet Investment (supra), we direct the Assessing Officer to work out the disallowance under section 14A afresh by considering only those investments which yielded dividend income during the year under consideration. Needless to order that before making fresh disallowance, the Assessing Officer shall grant opportunity to the assessee.

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

Order pronounced in the open court on 12/04/2019.

Sd/-

G.S. PANNU

VICE-PRESIDENT

Mumbai, Date: 12.04.2019

SK

Sd/-

PAWAN SINGH

JUDICIAL MEMBER

Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "C" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

**Dy./Asst. Registrar
ITAT, Mumbai**