

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "C", MUMBAI

BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER
AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER

ITA No.	AY.	Appellant	Respondent
2769/Mum/17	2009-10	The Asst. Commissioner of Income Tax, Circle-2(2)(2), MUMBAI	M/s.Pasha Finance Pvt. Limited, 3-3A, 32/34, Churchgate House, Veer Nariman Road, Fort, MUMBAI [PAN : AAACP8316P]
1779/Mum/17	2012-13		
C.O.No.	AY.	Appellant	Respondent
249/Mum/2018 (Arising out of ITA No.2769/M/17)	2009-10	M/s.Pasha Finance Pvt. Limited, 3-3A, 32/34, Churchgate House, Veer Nariman Road, Fort, MUMBAI [PAN : AAACP8316P]	The Asst. Commissioner of Income Tax, Circle-2(2)(2), MUMBAI

Revenue by : Shri Awungshi Gimson &
Shri Abhirama Kartikeya

Assessee by : Shri Devendra Jain &
Shri Kumar Kale

Date of Hearing : 13-09-2019	Date of Pronouncement : 17-09-2019
------------------------------	------------------------------------

ORDER

PER RAJESH KUMAR, A.M:

These appeals filed by the Revenue are directed against the order(s) of the Commissioner of Income Tax(Appeals)-10, Mumbai for the AYs.2009-10 and 2012-13. Assessee filed

Cross-Objection against the appeal of Revenue for the AY.2009-10.

ITA No.2769/Mum/2017 (AY.2009-10):

2. The only issue raised by the Revenue in the present appeal is against the order of Ld.CIT(A) being perverse in directing the AO to withdraw the penalty levied on the issue of concealment of income u/s 271(1)(c) of the Act in view of the fact that the Tribunal has only set aside the issue to the file of AO.

3. We have heard the rival submissions of both the parties and perused the material on record including the impugned order. We observe from the facts before us that the Ld.CIT(A) has in view the order of Tribunal in quantum appeal, which was set aside to the AO, directed the AO to withdraw the penalty imposed u/s.271(1)(c) of the Act on the grounds that when the assessment order is set aside to AO, the penalty order has no legs to stand and has to be restored to AO. The order of CIT(A) is very reasoned and as per law as the penalty cannot survive when the issue is set aside by the Tribunal in quantum appeal. The operative part of the order of the Ld.CIT(A) is reproduced herein below :-

“4.2. I have carefully considered the facts of the case and submissions of the ld.AR. I have also gone through the decisions relied on by the AO and the ld.AR. It is seen from the facts of the case, that the CIT(A) has confirmed the disallowance made by the AO u/s 36(1)(iii) since the appellant has advanced interest bearing funds borrowed from private parties at a high rate of interest to its sister concerns without charging any interest or charging a lesser rate of interest when compared to the rate at which it was borrowed. In further appeal by the appellant the ITAT 'C' Bench, Mumbai vide

its order in ITA No.2851/Mum/2014 dated 06/10/2016 has set aside the issue to the file of AO for re-examination of the working of interest filed by the appellant before them. Since, this issue has been set aside by the ITAT to the file of the AO, the penalty levied u/s 271(1)(c) should be kept on hold. Therefore, I direct the AO to withdraw the penalty levied on this issue. However, he is at liberty to levy the penalty if he again decides the issue against the appellant and finds that there is a concealment of income.”

3.1. We, therefore, do not find any reason to interfere with the order of Ld.CIT(A) in this regard and accordingly we uphold the same by dismissing the appeal of Revenue for the AY.2009-10.

4. The assessee in its Cross-Objection No.249/Mum/2018 for the AY.2009-2010, has challenged the penalty proceedings initiated u/s.274 r.w.s.271(1)(c) of the Act on the ground that the AO has not specified one of the two limbs under which the penalty proceedings has been initiated.

5. Since we have already dismissed the appeal of Revenue for the AY.2009-10 in ITA No.2769/Mum/2017, challenging the order of CIT(A) in which the Ld.CIT(A) has directed the AO to withdraw the penalty as the issue is set aside to the file of AO by the ITAT in quantum appeal. Accordingly, the Cross-Objection of the assessee is rendered infructuous and is accordingly dismissed.

ITA No.1779/Mum/2017 (AY.2012-13):

6. The issue raised in Ground Nos.1 & 2 is against the order of CIT(A) in deleting the disallowance of Rs.86,09,520/- u/s.14A r.w.Rule 8D(ii) and also against restricting the disallowance u/s.14A r.w.Rule 8D(iii).

7. The facts in brief are that the AO during the course of assessment proceedings observed that the assessee has received exempt income by way of dividend of Rs.3,55,455/- u/s.14A r.w.Rule 8D while not attributing any expenses towards earning of such income. Accordingly, the AO called upon the assessee to explain as to why the provisions of section 14A r.w. Rule 8D should not be applied, which was replied by the assessee vide letter dated 08-01-2015 & 16-02-2015. The assessee submitted before the AO that the assessee own interest free funds available with the assessee were far more than the investments in equity shares, therefore, no disallowance is called for as the presumption in that case is that the assessee has made the investments out of own funds and not out of interest bearing funds. As regards disallowance u/s.8D(2)(iii), the assessee submitted that the total expenses of the assessee charged to the profit and loss account were only Rs.81,086/- and all these were not connected with the earning of exempt income and thus AO mechanically applied the provisions of rule 8D(2)(iii). The AO by rejecting the contentions of the assessee calculated the disallowance, by applying 0.5% on the average investments, at Rs.3,90,430/- by ignoring the fact that in any case the disallowance cannot exceed the actual expenses which is Rs.81,086/-.

8. In the appellate proceedings, Ld.CIT(A) allowed the appeal of the assessee by holding that so far as disallowance u/s.8D(2)(ii) is concerned, the assessee's own funds were far more than the investments made by the assessee in the share/securities yielding tax free income, therefore, the

presumption is that the investments were made out of assessee's own funds and not out of interest bearing funds. In this connection the Ld.CIT(A) has relied on the decision in the case of HDFC Bank Ltd., [366 ITR 505]. On the disallowance of Rs. 3,90,430/- under rule 8D(2)(iii), the Ld.CIT(A) observed that the disallowance u/s.8D(2)(iii) cannot exceed the actual expenses charged to profit and loss account. During the year, the expenses under the head other expenses were only Rs.81,086/-. Accordingly, the Ld.CIT(A) held that at most the disallowance under rule 8D(2)(iii) should be at Rs.81,086/- and, thus, restricted the disallowance to that amount.

9. After hearing both the parties and perusing the material on record, we observe that the order of Ld.CIT(A) is very reasoned and a speaking one. Ld.CIT(A) has rightly relied on the decision in the case of HDFC Bank Ltd. (supra), wherein the Hon'ble Bombay High Court has held that in case the interest free funds available with the assessee are more than the investments in the securities yielding exempt income then the presumption has to be drawn that investments are made out from interest free funds and not out of interest bearing funds. Similarly, on the issue of disallowance under rule 8D(2)(iii), the CIT(A) rightly observed that the disallowance cannot exceed the expenses incurred by the assessee. Hence, we uphold the order of Ld.CIT(A) in this regard. We are therefore inclined to uphold the order of Ld.CIT(A) by dismissing the Grounds Nos.1 & 2.

10. The issue in Ground Nos. 3 & 4 raised by the Revenue is against the order of Ld.CIT(A), rejecting the disallowance

u/s.36(1)(iii) of the Act of Rs.2,94,49,546/- as against the total disallowance of Rs.21,34,52,880/- made by the AO u/s.36(1)(iii) of the Act.

10.1. Facts in brief are that during the year the total borrowing as on 31-03-2012 was at Rs.53.48 crores whereas the total loans and advances to various parties were of Rs.70.33 crores. The assessee was engaged in the business of dealing in shares and securities. The assessee paid interest on the total borrowings to the tune of Rs.25,42,10,340/- and also received interest income of Rs.3,21,47,940/-. The AO observed that since the interest expenditure was not comparable to the interest income and, therefore, issued show cause notice to the assessee as to why the provisions of Section 36(1)(iii) of the Act should not be applied in the case of the assessee for the reasons that the assessee has clearly diverted higher rate interest bearing funds to either interest free loans/advances or at lower interest to related parties, which was replied by the assessee vide letter dated 16-02-2015 stating therein that the advances were given to the sister concerns out of commercial expediency and, therefore, provisions of Section 36(1)(iii) of the Act are not applicable. The AO did not agree with the contentions of the assessee and disallowed the same u/s.36(1)(iii) of the Act as given in para 5 of the assessment order.

11. In the appellate proceedings, the Ld.CIT(A) allowed the appeal of the assessee by observing and holding as under:

“5.2 I have carefully considered the facts of the case and the submissions of the ld.AR. I have also gone through the decisions

relied on by the AO and the ld.AR. It is seen from the records the appellant has made heavy private borrowings at very high rates of interest and paid interest of Rs. 25.42 crores. The interest received was only Rs. 3.21 crores. The AO has worked out the disallowance in a simple arithmetics by working of net interest paid and further reduced by the interest disallowed under limb(ii) of Rule 8D(2) and the balance was disallowed holding that the same was incurred on funds diverted for non-business purposes. The ld.AR on the other hand has worked out the interest diverted for non-business purposes at Rs. 2,94,49,546 and requested to consider only this amount for disallowance u/s 36(1)(iii) of the Act. I consider the working at page-58 of the paper book, volume.2 as reasonable and direct the AO to adopt the same for the purpose of disallowance u/s 36(1)(iii) of the Act. However, the AO is at liberty to verify the correctness of the working and the method adopted. The appellant is hereby directed to supply this working to the AO at the time of giving effect to this order. The ground is allowed accordingly.”

12. Ld. DR vehemently submitted before us that the CIT(A) has set aside the issue to the file of AO whereas the CIT(A) has no such power under the Act. Ld.DR submitted that the assessee has failed to submit any documentary evidences and explanation of interest paid on these advances to, whereas the same has been accepted and allowed the relief by the CIT(A) to the assessee. However, no such description was given by the CIT(A) in the appellate order. Accordingly, ld.DR submitted that the order of AO should be upheld.

13. On the other hand, Ld.AR submitted that no additional evidences were filed before the CIT(A) and only analysis of the loan advances/borrowed was given which was also available before the AO and, therefore, it is not an additional evidence.

14. After hearing both the parties and perusing the material available on record, we observe that the issue raised by the Revenue that the CIT(A) has no power to set aside the matter

to the AO for verification and allowing the same is not as per law and the CIT(A) has no such power to aside the issue to the file of AO. Besides the contention of Ld.DR was that the CIT(A) has admitted the additional evidence in the form of analysis of inflow and outflow of funds and interest thereon. The Ld.CIT(A) allowed relief to the tune of Rs.18,40,03,334/- on the basis of said analysis. So far as the question of admitting the additional evidence is concerned, we do not find any merit in the contentions of the Revenue as the CIT(A) has only considered the analysis of the inflow and outflow of the funds which was also filed by the assessee before the AO. Therefore, on this count, the ground raised by the Revenue does not succeed. So far as deciding the issue on the basis of analysis of inflow and outflow of the funds are concerned, we are of the view that the assessee has shown clearly that funds were given out of the commercial expediency and, therefore, we do not see any good reason to deviate from the findings of the CIT(A) in this regard. Accordingly, we dismiss this ground of appeal of Revenue. In result the, appeal of the Revenue is dismissed.

15. In the result, both the appeals of Revenue along with Cross-Objection of the assessee are dismissed.

Order pronounced in the open court on 17th September, 2019

Sd/-

(RAM LAL NEGI)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/Mumbai; दिनांक/Dated : 17-09-2019

TNMM

Sd/-

(RAJESH KUMAR)

लेखा सदस्य/ACCOUNTANT MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A), Mumbai
4. आयकर आयुक्त / CIT, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asst. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai