

IN THE INCOME-TAX APPELLATE TRIBUNAL “G” BENCH MUMBAI
BEFORE SHRI PRAMOD KUMAR, VICE-PRESIDENT AND
SHRI PAWAN SINGH JUDICIAL MEMBER

ITA No. 4928/Mum/2018 (Assessment Year 2013-14)

SMK Shares and Stock Broking Pvt. Ltd., 617, Palm Spring Center, Link Road, Malad (W), Mumbai 400 064 PAN – AABCS4531Q	Vs.	DCIT-4(2)(1) Aayakar Bhavan, M.K. Road, Mumbai- 400020
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Appellant

Respondent

Appellant by : Shri Satish Mody (AR)

Respondent by : Shri V. Vinod Kumar (Sr.DR)

Date of Hearing : 11.09.2019

Date of Pronouncement : 20.11.2019

ORDER UNDER SECTION 254(1) OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER:

1. The appeal by assessee is directed against the order of Id. Commissioner of Income-Tax (Appeals)-9, Mumbai [the Id. CIT(A)] dated 13.07.2018 for Assessment Year 2013-14. The assessee has raised the following grounds of appeal:.

1. The learned CIT(A) erred in appreciating that the value of stock in trade in shares and securities is not to be considered in working of disallowance u/s 14A read with Rule 8D.
2. The learned CIT(A) erred in confirming the business loss of Rs. 82,42,978/- as speculation loss by incorrectly applying the provisions contained in explanation to sec 73 of the Income Tax Act
3. Without prejudice to ground no. 2 above, the learned CIT(A) erred in confirming the attribution of the expenses of Rs.63,59,506/-, being 39.44% of the total expenses of Rs.1,61,24,509/-, towards the share trading activity of the company.

2. Brief facts are, the assessee is a company engaged in the business of a Share and Stock Broking and trading in shares and securities, filed its return of income on 26.08.2013 declaring total loss of Rs. 1,09,53,113/-. The case was selected for scrutiny. The assessing officer during the assessment proceeding noted that assessee shown dividend income of ₹ 5,23,328/- in its computation of income. The assessee made *suo moto* disallowance of ₹ 2,95,300/- under section 14A. The assessee was asked to substantiate the working of *suo moto* disallowance under section 14A. The assessee filed its reply; vide its reply dated 28th December 2015. The assessing officer has not recorded the contents of reply filed by the assessee. The assessing officer recorded that he is not satisfied with the working of disallowance under section 14A, furnished by assessee. The assessing officer invoked the provision of Rule 8D and made interest disallowance under rule 8D2(ii) of Rs. 4,44,988/- and indirect expenses under Rule 8D2(iii) of ₹ 3,60,833/-. The assessing officer after granting the set off of *suo moto* disallowance of ₹ 2,95,300/- made further disallowance of ₹ 5,10,521/-. The assessing officer further noted that in the profit and loss account, the major activities of the assessee is from sale of equity share and assessee has shown loss on share trading of ₹ 18,83,472/- in its share trading activities. The assessing officer noted treated the said loss as speculation loss in view of the Explanation to section 73 of the Act. The assessing officer further noted that the derivative trading loss cannot be

possible without allocation of expenses which is invariably incurred for derivative trading. The assessing officer on his view that total turnover of the assessee is Rs. 1033.05 crore, out of which the non-speculative turnover is ₹ 625.57 crore and speculation turnover is ₹ 407.48 crore. The assessing officer took the view that the turnover of speculative turnover is 39.44%, therefore, proportionate expenses attributable to the speculative activities should be disallowed. Accordingly, out of total expenses claimed by assessee of ₹ 1.61 crore, the assessing officer disallowed 39.44% of the expenses, which was worked out to ₹ 63,59,506/-. On appeal before Commissioner (Appeal) the disallowance under section 14A was restricted to the exempt income. And disallowance of expenses was upheld. Thus, further aggrieved by the order of learned Commissioner (Appeals) the assessee has filed present appeal before this Tribunal.

3. We have heard the submission of learned authorised representative (Id. AR) for the assessee and learned departmental representative (Id. DR) for the revenue and perused the material available on record. Ground No. 1 relates to disallowance under section 14A. The Id. AR of the assessee submits that the assessee utilised the interest bearing funds as well as assessee's own funds for making investment for earning exempt income and accordingly, while making the interest disallowance, the netting of the interest under Rule 8D2(ii) should be allowed.

4. On the other hand the Id. DR for the revenue supported the order of the Id. Commissioner (Appeals). The Id. DR for the revenue further submits that the Id. Commissioner (Appeals) has already granted sufficient relief to the assessee. Therefore, the assessee is not entitled for further relief. On the contention that the assessee be allowed relief of netting of interest free funds, the DR for the revenue submits that the assessee has not furnished its financial statement, and in case the contentions of the assessee is accepted the issue qua the disallowance may be restored to the file of assessing officer.
5. We have considered the rival submissions of the parties and have gone through the orders of the authorities below. During the assessment the assessing officer discarded the suo moto disallowance under section 14A, offered by the assessee. The assessing officer invoked the provisions of Rule 8D and made disallowance of interest expenses as well as indirect expenses and disallowed Rs. 8,05,821/- and after granting set off of suo moto disallowance made addition of Rs. 5,10,521/-. However, on appeal before Id. Commissioner (Appeals) the disallowance was restricted to the exempt income. Before, us the Id. AR for the assessee made limited submissions that the assessee may be allowed the netting of interest expenses qua the interest free funds available with the assessee. We have noted that before making interest disallowance under section 8D(2)(ii), the Assessing Officer has not examined the ratio of interest bearing fund and

interest free fund invested for earning exempt income. Before us the Id AR for the assessee made limited prayer that so far as disallowance under Rule 8D(2)(ii) is concerned, the assessee may be allowed netting of interest free funds available with them. Before, us the assessee has not filed the financial statement showing the details of interest bearing and interest free funds available with them. Therefore, considering the submissions of the Id AR for the assessee we restore the issue of interest disallowance under Rule 8D(2)(ii) to the file of assessing officer to examine the interest free funds available with the assessee and grant the benefit of netting of interest with regards to interest free funds available with the assessee at the time of making investment for earning exempt income. Needless to order that before passing the order the assessing officer shall grant opportunity to the assessee. So far as disallowance under Rule 8D(2)(iii) is concerned, the Id AR for the assessee has not contested the disallowance, which we affirm. In the result, this ground of appeal is partly allowed.

6. Ground No.2 relates to confirming the business loss of Rs. 82,42,978/- as speculation loss. The Id. AR of the assessee submits that Explanation to section 73 is not applicable to the assessee. The Explanation to section 73 is clarificatory in nature and has retrospective effect. In support of his submission, the Id. AR of the assessee relied upon the decision of Hon'ble Bombay High Court in CIT vs. Darshan Securities (P.) Ltd. [2012] 18 taxmann.com 142 (Bom.) on the ratio that the deeming fiction stipulates

that where any part of the business of a company consists in the purchase and sale of shares of other companies, such company shall, for the purposes of the section be deemed to be carrying on a speculation business to the extent to which the business consists of the purchase and sales of such shares. The deeming fiction applies only to a company and the provision makes it clear that the deeming fixation extends only for the purposes of the section.

7. In alternative, the Id. AR of the assessee submits that allocation of expenses for speculative business transaction, the only incremental cost should be taken into account.
8. On the other hand, the Id. DR for the revenue supported the order of authorities below. The Id. DR further submits that share sold and bought by assessee are not owned by the assessee-company, the assessee-company merely executes the transaction on behalf of its client in the capacity of intermediary as share broker and earned commission. The assessee-company is not responsible for any profit earned or loss incurred out of transaction on behalf of its client. The role of assessee is different from its role as a share broker. The loss of broker from its own speculation business cannot be set off against the commission income earned. On allocation/disallowances of expenses the Id DR for the revenue relied on the order of lower authorities.

9. We have considered the submission of the parties and perused the material available on record. We have noted that the Assessing Officer while passing the assessment order treated the loss on share trading in its own trading as speculation loss. The Assessing Officer further took his view that assessee is engaged in the business of share trading and share broking. The assessee in share broking is earning commission income from its client and the loss suffered by assessee cannot be set off against the said commission income and accordingly treated the said loss as speculation loss. Besides that the Assessing Officer took his view that as per Explanation-2 to section 28 that where the speculation transaction carried out by assessee in such a nature as to constitute the business, the business shall be deemed to be distinct and separate from any other business. Hence, proportionate expenditure incurred toward speculation transactions are liable to be separately disallowed. Accordingly, the Assessing Officer worked out the turnover of speculation business as of 39.44% of the total turnover and proportionately disallowed 39.44% being Rs. 63,59,506/- out of the total expenses of Rs. 1,61,24,509/-, claimed by the assessee. The Id. CIT(A) confirmed the action of Assessing Officer by taking view that the assessee has not suggested reliable alternative method. Therefore, the method adopted by Assessing Officer cannot be faulted. Before us, the Id. AR of the assessee vehemently submitted that only incremental cost should be taken into account while making disallowance on account of speculative

activities. Considering the facts and circumstances of the case that assessee has shown a loss of Rs. 18,83,472/- in share trading activities, and the assessing officer has disallowed expenses of Rs. 63,59,506/- which is seems to be unreasonable and excessive. Therefore, we restore this ground of ground of appeal to the file of the Assessing Officer to consider only incremental cost should be taken into account while disallowing the expenses and pass the order on this issue afresh. Needless to order that before passing the order the assessing officer shall grant opportunity to the assessee. In the result, this ground of appeal is allowed for statistical purpose.

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

Order pronounced in the open court on 20/11/2019.

**Sd/-
PRAMOD KUMAR
VICE-PRESIDENT**

**Sd/-
PAWAN SINGH
JUDICIAL MEMBER**

Mumbai, Date: 20.11.2019

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Copy of the Order forwarded to :

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

BY ORDER,

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