

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D", MUMBAI**

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

**ITA.NOs. 605 & 606/MUM/2018
(A.Ys: 2013-14 & 2014-15)**

M/s. Mentor Capital Limited 713, Raheja Centre Free Press Journal Marg Nariman Point, Mumbai - 21 PAN: AACCP7995G	v.	Dy Commissioner of Income Tax Central Circle– 3(3) Air India Building, 19 th Floor Nariman Point, Mumbai – 21
(Appellant)		(Respondent)

**ITA.NOs. 1476 & 1479/MUM/2018
(A.Ys: 2013-14 & 2014-15)**

Dy Commissioner of Income Tax Central Circle– 3(3) Room No. 1923, 19 th Floor Air India Building, Nariman Point Mumbai – 400 021	v.	M/s. Mentor Capital Limited 713, Raheja Centre Free Press Journal Marg Nariman Point, Mumbai - 21 PAN: AACCP7995G
(Appellant)		(Respondent)

Assessee by	:	Shri N.R. Suresh
Department by	:	Smt Jothilakshmi Nayak
Date of Hearing	:	13.12.2019
Date of Pronouncement	:	30.12.2019

ORDER**PER C.N. PRASAD (JM)**

1. These cross appeals are filed by the assessee and revenue against different orders of the Learned Commissioner of Income Tax (Appeals) – 51, Mumbai [hereinafter in short “Ld.CIT(A)”] dated 18.12.2017 for the Assessment Years 2013-14 & 2014-15.

2. Briefly stated the facts are that, the assessee an investment company filed return of income on 30.09.2013 for the A.Y. 2013-14 declaring loss of ₹.21,78,23,416/-. The assessment was completed u/s.143(3) on 10.03.2016 and while completing the assessment the Assessing Officer noticed that the assessee made suo moto disallowance of ₹.4,34,49,075/- towards expenses attributable for earning exempt income. Assessing Officer also further noticed that assessee claimed exempt income and is having investment yielding income as well as business assets. Assessing Officer also noticed that assessee maintains consolidated accounts and there is no possibility of establishing one to one nexus to expenses and exempt income yielding investments. Assessing Officer also observed that the assessee utilized borrowed funds and claimed interest. The Assessing Officer has recorded his dissatisfaction that the working of disallowance shown by the assessee is

not correct and required the assessee to explain as to why the disallowance u/s. 14A r.w. Rule 8D should not be made.

3. Assessee furnished its explanation stating that only direct expenses incurred for earning income which is exempt from tax should be disallowed u/s. 14A. In other words, it is submitted that the expenditure which is directly linked to the income which is free from tax can be subject to disallowance u/s. 14A of the Act. It was further submitted that no interest to be disallowed since own funds have been used for purchase of investments earning exempt income. Reliance was also placed on various decisions. However not convinced with the submissions of the assessee the Assessing Officer invoked the provisions of section u/s. 14A r.w.r.8D and made disallowance of ₹.7,92,91,328/- comprising of interest of ₹.6,00,42,412/- under Rule 8D(2)(ii) and expenses of ₹.1,92,48,916/- under Rule 8D(2)(iii) of I.T. Rules. -. However, since the assessee itself shown suomoto disallowance of ₹.4,34,49,075/- Assessing Officer computed the balance disallowance u/s. 14A r.w. Rule 8D at ₹.3,58,42,253/-.

4. Similarly, for the A.Y. 2014-15 the Assessing Officer computed the disallowance under Rule 8D at ₹.7,73,27,738/- comprising of interest of ₹.5,48,38,414/- under rule 8D(2)(ii) and expenses of ₹.2,24,89,323/-

under rule 8D(2)(iii) of I.T. Rules. However, since the assessee itself made suo moto disallowance of ₹.2,24,89,323/- Assessing Officer computed the balance disallowance u/s. 14A r.w. Rule 8D of I.T. Rules at ₹.5,48,38,414/-.

5. Assessee carried the matter before the Ld.CIT(A) and the Ld.CIT(A) deleted the interest disallowance made under Ruled 8D(2)(ii) of I.T. Rules observing that assessee had sufficient interest free funds in the form of share capital and reserves as against the investments yielding exempt income. Ld.CIT(A) following the decision of the Hon'ble Jurisdictional High Court in the case of the HDFC Bank [ITA.No. 330 of 2012] and Reliance Utilities [313 ITR 340 (Bom)] held that no interest disallowance is warranted. He also observed that in assessee's own case for the A.Ys. 2008-09 to 2011-12 the ratio of these decisions of the Hon'ble Jurisdictional High Courts have been followed by the Tribunal while deciding the issue in assessee's favour. However, coming to the disallowance made under Rule 8D(2)(iii) of I.T. Rules, Ld.CIT(A) sustained the same observing that the same is confirmed by the Tribunal in earlier years. Against this order of the Ld.CIT(A) both assessee as well as the revenue are in appeal before us.

6. In so far as the revenue's appeals are concerned, the revenue challenged the order of the Ld.CIT(A) in deleting the disallowance made u/s. 14A r.w. Rule 8D(2)(ii) of I.T. Rules in respect of interest.

Ld. DR vehemently supported the orders of the Assessing Officer and Ld. Counsel for the assessee supported the order of the Ld.CIT(A).

7. On hearing both sides and perusing the order of the Ld.CIT(A) we find that Ld.CIT(A) deleted the disallowance of interest as the assessee had surplus interest free funds in the form of capital and reserves and therefore following the decisions of the Hon'ble Jurisdictional High Court in the cases of HDFC Bank (supra) and Reliance Utilities (supra) he has deleted the disallowance. In the circumstances, we do not see any valid reason to interfere with the findings of the Ld.CIT(A). Grounds raised by the revenue are rejected.

8. Coming to the appeals of the assessee, the assessee challenged the order of the Ld.CIT(A) in confirming the disallowance of administrative expenses disallowed under Rule 8D(2)(iii) of I.T. Rules. The ground raised by the assessee reads as under: -

"1. The Commissioner of Income-tax (Appeals) erred in confirming the disallowance of administrative expenditure of ₹.4,34,49,075/- instead of restricting disallowance to the lower of actual expenditure claimed in the computation of income or ½% of

the average of the total investments yielding tax-free income in as much as the disallowance cannot exceed the actual expenditure claimed as deduction.”

9. It is the submission of the assessee that, the disallowance of administrative expenses under Rule 8D(2)(iii) should be restricted to 0.5% of the average value of total investments even though the assessee suo moto disallowed ₹.4,34,49,075/- and ₹.2,24,89,323/- for the A.Ys. 2013-14 & 2014-15 respectively. Reliance was placed on the following decisions: -

- (i) Sajjan India Ltd., v. Addl. CIT [89 taxmann.com 21 (Mumbai – Tribunal)]
- (ii) Pr. CIT v. Adani Agro Pvt. Ltd., [91 taxmann.com 29 (Gujarat)]
- (iii) Darasshaw & Company Pvt. Ltd., v. DCIT [86 taxmann.com 41 (Bom)]

10. It was further submitted that by the Ld. Counsel for the assessee that the issue as to whether the assessee is entitled to a relief more than what is claimed in the return, has been considered by the Hon'ble ITAT in assessee's own case for the A.Ys. 2008-2009 to 2011-12 in ITA Nos. 194 to 196/Mum/2015 and ITA.No. 7512/Mum/2014 dated 03.08.2016.

11. Ld. Counsel for the assessee further submitted that this was again followed in the assessee's case by the co-ordinate bench for the Assessment Year 2012-2013 in ITA No. 3749/Mum/2017 wherein the ITAT directed the Assessing Officer to re-compute the disallowance at 0.5% of the average value of the investments. Therefore, it is submitted

that the Hon'ble ITAT may be pleased to direct the Assessing Officer to restrict the disallowance of administrative expenditure at 0.5% of the average value of the total investments and as quantified in the assessment order by the Assessing Officer.

12. Ld. DR submitted that, before the Ld.CIT(A) the question was only invoking of Rule 8D and not the reduction of suomoto disallowance. Ld. DR submitted that even in the Tax Audit Report it has been mentioned that the disallowance to be made u/s. 14A of the Act in respect of expenditure incurred in relation to income is ₹.3,79,05,583/-. It is therefore submitted that the Ld.CIT(A) rightly sustained the disallowance made under rule 8D(2)(iii) of I.T. Rules.

13. In reply the Ld. Counsel for the assessee submitted that at the time of tax audit report the decision of the Hon'ble Jurisdictional High Court in the case of the HDFC Bank [49 taxmann.com 335] was not available and therefore, the quantification could not be made in accordance with law.

14. We have heard the rival submissions, perused the orders of the authorities below. We find that an identical issue has come up in assessee's own case for the Assessment Years 2008-09 to 2011-12 in ITA Nos. 194 to 196/Mum/2015 and ITA.No. 7512/Mum/2014 dated

03.08.2016 wherein the Tribunal directed the Assessing Officer to restrict the disallowance under Rule 8D(2)(iii) of I.T. Rules, to the extent of 0.5% of the average investments observing as under: -

"51. So far as the contention that the assessee itself has offered disallowance in the return of income is concerned, the Id. AR has relied upon various case laws to stress the point that even if the assessee under a mistake or misconception has over assessed itself in the return of income, the Tribunal can give relief to the assessee to the extent the assessee is over assessed and direct the lower authorities to tax the assessee as per the provisions of law. We find that in the case of "National Thermal Power Co. Ltd." vs. CIT" 229 ITR 383, the facts before the Hon'ble Supreme Court were that the assessee in that case offered the interest amount for taxation and the assessment was completed on that basis. Before the Ld. CIT (A), the assessee though had taken a number of grounds of appeal; however, the inclusion of the said amount of interest was not challenged. The inclusion of the said amount of interest was not objected to even in the grounds of appeal as originally filed before the Tribunal. However, the assessee by way of subsequent letter raised the additional ground in relation to the said inclusion of interest into the income of the assessee. In the above circumstances, the question before the Hon'ble Supreme Court was "Where on the facts found by the authorities below a question of law arises (though not raised before the authorities) which bears on the tax liability of the assessee, whether the Tribunal has jurisdiction to examine the same?" The Hon'ble Supreme Court while answering the said question observed that under section 254 of the Income Tax Act, the power of the Tribunal in dealing with the appeals is expressed in the widest possible terms; the power of the Tribunal under section 254 is not restricted only to decide the grounds which arise from the order of the Commissioner of Income Tax (Appeals); that both the assessee as well as the department have a right to file an appeal/cross objection before the Tribunal and the Tribunal is not prevented from considering questions of law arising in assessment proceedings although not raised earlier. While answering the question in affirmative, the Hon'ble Supreme Court concluded that the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee.

52 The full bench of the Hon'ble Bombay High Court in the cases of "Ahmedabad Electricity Company Ltd. vs. CIT" and "Godavari Sugar Mills Ltd. vs. CIT" by way of a common order dated 30.04.1992 (1993) 199 ITR 351 has observed that the basic purpose of an appeal procedure in an income tax matter is to ascertain the correct

tax liability of the assessee in accordance with law. Therefore, at both the stages, either by the Appellate Assistant Commissioner or before the Appellate Tribunal, the appellate authority can consider the proceedings before it and the material on record before it for the purpose of determining the correct tax liability of the assessee. The Hon'ble Bombay High Court in the case of "CIT vs. Pruthvi Brokers and Shareholders Pvt. Ltd." (2012) 349 ITR 336 (Born.) has observed that the 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 jurisdiction to deal not merely with additional grounds, which became available on account of change of circumstances or law, but with additional grounds which were available when the return was filed. The words 'could not have been raised' must be construed liberally and not strictly. There may be several factors justifying the raising of a new plea in an appeal and each case must be considered on its own facts.

53. *The co-ordinate bench of the Tribunal in the case of "Shri Chandrashekhar Bahirwani" ITA NO.7810/M/2010 and 6599/M/2011 vide order dated 17.06.2015 while deciding the question as to whether the income cannot be assessed less than the returned income has observed as under:*

"5. Now coming to the finding of the Ld. CIT(A), that income cannot be assessed less than the returned income, the Ld. A.R. of the assessee has submitted before us that the action of the Ld. CIT(A) in rejecting the claim of the assessee on this ground was not justified. He has further relied upon the decision of the Hon'ble Gujarat High Court in the case of "Gujarat Gas Ltd. vs. JCIT" (2000) 245 ITR 84. In the said case, the words of the Circular No.549, para 5.12, dt. 31st October, 1989, providing that the assessed income under section 143(3) shall not be less than the returned income was considered by the Hon'ble High Court and it was held that as per proviso to section 119 of the Act, the Board cannot issue instructions to the Income Tax Authority to make a particular assessment or to dispose of a particular case in a particular manner as well as not to interfere with the discretion of the Commissioner in exercise of his appellate functions. It was further held that the AO, while exercising his quasi judicial powers, was not bound by the said circular and should have exercised his powers independently. The Hon'ble High Court, therefore, directed the AO to make the assessment without keeping in mind the said circular. It may be further observed that the Hon'ble Bombay High Court in the case of 'Pruthvi Brokers & Shareholders Pvt. Ltd.' ITA No.3908 of 2010 decided on 21.06.12, while relying upon the various decisions of the Hon'ble Supreme Court and other Hon'ble High Courts has held that even if a claim is not made before the AO, it can

be made before the appellate authorities. The jurisdiction of the appellate authorities to entertain such a claim is not barred. The Hon'ble High Court has further observed that the decision of the Hon'ble Supreme Court in the case of 'Goetze (India) Limited v. CIT' (2006) 157 Taxman 1, relating to the restriction of making the claim through a revised return was limited to the powers of the Assessing Authority and the said judgment does not impinge on the power or negate the powers of the appellate authorities to entertain such claim by way of additional ground. Even otherwise, the Ld. CIT(A) ought to have considered the claim of the assessee in exercise of his appellate jurisdiction under section 250 of the Act. Moreover, if the assessee is, otherwise, entitled to a claim of deduction but due to his ignorance or for some other reason could not claim the same in the return of income, but has raised his claim before the appellate authority, the appellate authority should have looked into the same. The assessee cannot be burdened with the taxes which he otherwise is not liable to pay under the law. Even a duty has also been cast upon the Income Tax Authorities to charge the legitimate tax from the tax payers. They are not there to punish the tax payers for their bonafide mistakes. In view of our above observations, it is held that the assessee is not liable to pay Capital Gains Tax, though originally he had subjected himself to the said tax as per his return of income. The AO is directed to process the claim of refund in this respect as per provisions of the law."

54. *Respectfully following the above decisions of higher courts and that of co-ordinate benches of the tribunal, we direct the AO to delete the disallowance of interest u/s.14A and restrict the disallowance of common expenses to the extent of 0.05% of average investment."*

15. We also observe that in the case of the Sajjan India Ltd v. Addl. CIT (supra) it has been held that the mandate of the Income Tax Act is to tax real income and tax can only be levied under authority of law. Therefore, for disallowance u/s. 14A offered by assessee in return of income, revenue cannot charge tax on income which never was income of the assessee chargeable to tax.

16. Thus, respectfully following the above said decisions, we direct the Assessing Officer to recompute the disallowance under Rule 8D(2)(iii) of I.T. Rules by excluding the suomoto disallowance made by the assessee and by retaining the disallowance only to the extent of ₹.1,92,48,916/- and ₹.2,24,89,323/- which was already computed under Rule 8D(2)(iii) of I.T.Rules in the Assessment Orders passed for Assessment Years 2013-14 and 2014-15 respectively.

17. In the result, appeals of the assessee are allowed as indicated above and appeals of the revenue are dismissed.

Order pronounced in the open court on the 30th December, 2019

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER
Mumbai / Dated 30/12/2019
Giridhar, Sr.PS

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum