

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

**BEFORE SHRI PAWAN SINGH, JM &
SHRI S. RIFAUR RAHMAN, AM**

आयकरअपीलसं./ I.T.A. No. 7202/Mum/2018
(निर्धारणवर्ष / Assessment Year: 2011-12)

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| DCIT – 14(3)(2), 4 th floor, Aayakar Bhavan, M. K. Road, Mumbai-400 020 | बनाम/ Vs. | Shetusha Engineers & Constructors Pvt. Ltd. 101, Balrama, BKC, Bandra(E), Mumbai-400 051 |
| स्थायीलेखासं./जी आइ आरसं./PAN No. AABCS4323C | | |
| (अपीलार्थी/ Appellant) | : | (प्रत्यर्थी / Respondent) |

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| अपीलार्थीकीओरसे/ Appellant by | : | Shri V. Vinod Kumar, DR |
| प्रत्यर्थीकीओरसे/ Respondentby | : | None |
| सुनवाईकीतारीख/ Date of Hearing | : | 20.01.2020 |
| घोषणाकीतारीख / Date of Pronouncement | : | 05.02.2020 |

आदेश / ORDER

Per S. Rifaur Rahman, Accountant Member:

The present Appeal has been filed by the revenue against the order of Ld. Commissioner of Income Tax (Appeals) - 22 in short referred as 'Ld. CIT(A)', Mumbai, dated 24.09.2018 for Assessment Year (in short AY) 2011-12.

2. At the outset, it is noticed that none appeared on behalf of assessee in spite of calls and even no application for adjournment was moved. From the records, we also noticed that notice was issued to the assessee on the address given by the assessee on Form No. 36. But even in spite of that none appeared on behalf of the assessee. On the other hand, Ld. DR is present in the court and is ready with arguments. Therefore, we have decided to proceed with the hearing of the case ex-parte with the assistance of the Ld. DR and the material placed on record.

3. Further it is noticed that AR on behalf of the assessee vide its application submitted that tax effect of this appeal is only 77,427/- and department should be advised to withdraw this appeal.

4. On the other hand, Ld. DR submitted that this appeal is on bogus purchases and based on the information from Sales Tax Department, therefore it should fall under exceptional case.

5. From the records, we notice that the issue under consideration is based on the information received from Sales Tax Department that assessee is indulged in bogus purchases to the

extent of Rs. 2,63,550/- during this assessment year and assessee was asked to submit the relevant documents and the dealers with whom assessee has purchased are genuine. In response, assessee filed the copy of the delivery challan and material inward register. Further, it submitted that payments were made through cheque. But, AO did not accept the information submitted by assessee and treated the purchases as bogus and made the whole addition. Further, AO noticed that assessee has earned dividend income of Rs. 280,068/- as exempt income and has not made any disallowance for the relevant expenditure. When asked, assessee has submitted that he has sufficient non-interest bearing fund in the company and assessee has not made any expenditure in earning of such exempt income. AO rejected the contentions of the assessee and made disallowance u/s 14A of the Act by applying rule 8D (2)(ii) &(iii) to the extent of the Rs. 22,832/-

6. Aggrieved with the above order, assessee preferred appeal before Ld. CIT(A) and Ld. CIT(A) after considering the submission of assessee restricted the disallowance to the extent of 12.5% of bogus purchases by relying on Hon'ble Gujrat High Court in the case of Smith P. Seth 356 ITR 451 with regard to

disallowance made u/s 14A of the Act. Ld. CIT(A) gave relief to the assessee with regard to rule 8D(2)(ii) of the Act by relying upon the decision of Hon'ble Bombay High Court in the case of CIT vrs. Reliance Utility Power Ltd and HDFC Bank vrs. DCIT (2014) 49 taxmann.com 335(Bom).

7. Aggrieved with the above order, revenue is an appeal before us raising the following grounds:-

1. "Whether on the facts and in the circumstances of the case, the Ld. CIT(A) erred in restricting the addition to 12.5 % of the amount of bogus purchases whereas the CIT(A) ought to have appreciated that the assessee failed to discharge the onus cast upon it to prove the genuineness of the claim of purchases made, when lawfully called upon by the AO to do so. In the result, the entire amount was liable to be added back to the total income."

2. Whether on the facts of the instant case and in law, the Ld. CIT(A) was justified in deleting the disallowance amounting to Rs. 19,965/- (on account of interest component as per rule 8D(2)(ii)) that is contrary to the provisions of Section 14A read with Rule 8D, as it stood for the relevant Assessment Year.

3. Whether on the facts of the instant case and in law, the Ld.CIT(A) was justified in placing reliance on the ratio laid down by the Hon'ble Bombay High Court in the case of CIT Vs. HDFC Bank Ltd. [2014] 49 taxmann.com 335 (Bom), & other cases, which considered the law as it stood for A.Y.2001-02 to A.Y.2005-06 before Section 14A was amended to incorporate a prescribed method for calculating the disallowance?

4. The appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of appeal.

5. The appellant prays that the order of CIT(A) on the above ground be set-aside and that of the assessing officer be restored.

8. Considered the submission of Ld. DR and material placed on record as well as orders passed by the revenue authorities, we notice that Ld. CIT(A) came to the conclusion that assessee has submitted the copy of bills alongwith delivery challans of alleged suppliers in respect of its contentions that the purchases are genuine. However, respective suppliers have admitted on oath before Sale Tax Department that these purchases were accommodation entries and are not genuine. Further, it is observed

that there can be no sales without corresponding purchases, the only logical explanation is that the assessee would have made purchases from undisclosed parties in the grey market at lower rates and purchases were shown as made from impugned parties to suppress its profits. In such a situation, the Hon'ble Gujrat High Court in the case of Smit P. Seth (supra) have held that nor the entire purchases but only the profit element embedded in these purchases was to be disallowed. Accordingly, Ld. CIT(A) restricted the disallowance to the extent of 12.5% of the bogus purchases. Looking at the overall situation, we are not inclined to accept the submission of Ld. DR. Therefore, grounds raised by the revenue are **dismissed**.

9. With regard to ground no.3 and 4 in respect of assessee has sufficient non-interest bearing fund, we notice that Ld. CIT(A) relied on the decision of Reliance Utility Power Ltd and HDFC Bank(supra) wherein addition cannot be made under rule 8D(2)(ii), which relates to the assessment years, which is prior to the amendment made in Section 14A of the Act. In the amended provisions, the method of calculation introduced by the legislature to curb the ambiguity in the way of calculating the interest

disallowance when different sources of funds were used in running the business. It is a fit case for calculating the disallowance by applying Rule 8D(2)(ii) for section 14A of the Act. After considering the facts of the case, we are in agreement with Ld. DR that section 14A disallowance has to be made when there is utilization of mixed funds in the business. At the same time, we notice that AO has considered the total investments made by the assessee, after considering the fact that disallowance u/s 14A can be made only on those investments which has generated exempt income. Therefore, we are remitting this issue back to the file of AO with a direction to consider only those investments which has generated exempt income to calculate the disallowance under rule 8D(2)(ii) of the Act. Accordingly, grounds raised by the revenue are partly allowed for statistical purposes.

10. In the net result, the appeal filed by the revenue stands **partly allowed for statistical purposes.**

Order pronounced in the open court on 5th Feb, 2020.

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| Sd/- (Pawan Singh) न्यायिकसदस्य / Judicial Member मुंबई Mumbai; दिनांक Dated : Sr.PS. DK | Sd/- (S. Rifaur Rahman) लेखासदस्य / Accountant Member 05 .02.2020 |
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आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
 2. प्रत्यर्थी/ The Respondent
 3. आयकरआयुक्त(अपील) / The CIT(A)
 4. आयकरआयुक्त/ CIT- concerned
 5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR,
ITAT, Mumbai
 6. गार्डफाईल / Guard File
- आदेशानुसार/ BY ORDER,**

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai