

**IN THE INCOME TAX APPELLATE TRIBUNAL
“F” BENCH, MUMBAI**

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

आयकरअपीलसं./ I.T.A. No. 5222, 5223 & 5224/Mum/2018
(निर्धारणवर्ष / Assessment Year: 2011-12 to 2013-14)

Vikram Shah, 3401, Era III, Marathon Next Gen, G. K. Marg, Lower Parel, Mumbai-400 013	बनाम/ Vs.	JCIT-18(2), Mumbai Pin-
स्थायीलेखासं./जी आइ आरसं./PAN No. AALPS7781H		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri Sanjay C. Shah, AR
प्रत्यर्थीकीओरसे/ Respondent by	:	Shri Mohammed Rizwan, DR

सुनवाईकीतारीख/ Date of Hearing	:	09.12.2019
घोषणाकीतारीख / Date of Pronouncement	:	28.02.2020

आदेश / ORDER

PER S. RIFAUR RAHMAN (ACCOUNTANT MEMBER):

The present three appeals have been filed by the assessee against the order of Ld. Commissioner of Income Tax (Appeals)-33, Mumbai, dated 29.06.18 for AY 2011-12 to 2013-14.

2. Since the issues raised in these appeals are identical, therefore, for the sake of convenience, these appeals are clubbed, heard and disposed off by this consolidated order. Firstly, we are taking ITA No. 5222Mum/2018 for AY 2011-12 filed by the assessee on the grounds mentioned herein below:-

1. *Learned Commissioner of Income Tax (Appeals) erred in partly confirming the order of Learned Assessing Officer who made disallowance of Rs. 9,57,420/- u/s 37 of the Act (being 30% of depreciation on building, maintenance expenses and electricity expenses) over and above disallowance made by the Appellant in the Return of Income filed which was reduced to Rs. 8,20,646/- by Ld. CIT (Appeals).*

Appellant submits that in view of the facts and circumstances of the case as well as in law entire part disallowance u/s 37(1) of the Act to the tune of Rs. 8,20,646/- confirmed by Learned CIT (Appeals) is bad in law and deserves to be deleted.

2. *Learned Commissioner of Income Tax (Appeals) erred in partly confirming the order of Learned Assessing Officer in sustaining additions of Rs. 168,000/- u/s 23(1)(a) of the Act to the total income of the Appellant on the plea that the same is taxable as*

notional rent as against an addition of Rs. 2,52,000/- made by Learned Assessing Officer,

Appellant submits that in view of the facts and circumstances of the case as well as in law the said addition of notional rent to the tune of Rs. 1,68,000/- is bad in law and deserves to be deleted.

Without prejudice to the above, Appellant submits that in view of the facts and circumstances of the case as well as in law the said addition made to the total income may please be suitably deleted/ reduced as per the provisions of law.

3. Learned Commissioner of Income Tax (Appeals) erred in confirming the order of Learned Assessing Officer in making disallowance of Rs. 7,79,118/- u/s 14A of the Act on the plea that same is alleged Notional Expenditure for the purpose of earning Exempt income.

Appellant submits that in view of the facts and circumstances of the case as well as in law the said disallowance u/s 14A to the tune of Rs.7,79,118/- is bad in law and deserves to be deleted.

3. In the appeal, assessee has raised 3 grounds and out of these 3 grounds, assessee has not pressed ground no. 2,

accordingly ground no. 2 is dismissed as not pressed. We notice that Ground no. 1 & 3 are common grounds in other 2 appeals filed by the assessee for AY 2012-13 & 2013-14.

Ground no. 1

4. Now coming to ground no. 1, the relevant facts is that during assessment proceedings, AO noticed that assessee has shown income from salary, business and other sources for which assessee has filed the details. AO observed that assessee is engaged in the business of trading and dealing in shares & units and finance. Assessee is using part of his house property for business purposes and claimed depreciation 50% of the value of the property, 50% of the maintenance expenses and 50% of the electricity expenses. Further, during assessment proceedings, AO deputed an inspector of his office to inspect the house of the assessee and it is reported that currently assessee is using 15% of the said house for its business purposes and accordingly, assessee was asked to substantiate its claim. In response, assessee filed a letter dated 22.02.13 submitted that during this assessment year, assessee was using 50% of the residential house for the purpose

of office and since assessee was incurring huge loss in the subsequent assessment years, assessee has reduced his business operation and found to using only 15% of the house. Since the AO verified during the assessment proceedings i.e. in year 2014, but in the present assessment year, assessee was using 50% of the house property, accordingly, he prayed that claim of the assessee may be allowed. After considering the submission of the assessee, AO rejected the contentions of the assessee and restricted the claim of the assessee to the extent of utilization of the house property as per the report of Inspector. Therefore, AO increased the disallowance of 50% of the expenditure to 85% of the expenditure relating to depreciation on building, maintenance expenses and electricity expenses.

5. Aggrieved with the above order, assessee preferred appeal before Ld. CIT(A) and Ld. CIT(A) after considering the submission of assessee, reduced the disallowance of 85% to 80%.

6. Aggrieved with the above order of Ld. CIT(A), assessee filed the present appeal before us.

7. Before us, Ld. AR brought to the notice of facts of the present case and referred page 25 of the paper book in which, assessee has made submission before AO and made a detail submission justifying the usage of 50% of flat and other expenditure and submitted a factual issue that AO has sent the inspector only during the assessment proceeding i.e. in 2014 and he prayed that assessee's plea may be accepted and given the relief. He further submitted that similar disallowance were made in subsequent assessment years and assessee is making similar pleas for those assessment year also.

8. On the other hand, Ld. DR submitted that Ld. CIT(A) has considered the submission of the assessee and gave relief to the assessee and he brought to our notice para 6 & 8 of the order of Ld. CIT(A) and supported the findings of Ld. CIT(A).

9. Considered the rival submissions and material placed on record, we notice that assessee is carrying its business operation from his residential house and claimed business expenditure to the extent of 50% of the house property i.e. depreciation on house property, maintenance expenses and electricity expenses.

We also notice that assessee is incurring loss in the subsequent assessment years and it is fact that AO has verified the utilization of office space used by the assessee for the purpose of his business in the residential property during the assessment proceeding i.e. in year 2014. AO dealt with the issue of the AY 2011-12 i.e. after 3 years.

10. Considering the overall situation and time lapse between the claim of the assessee and verification of the claim of the assessee, in our considered view, assessee might have reduced the space over the years considering the business condition, we may have to pass on the benefit of doubt to assessee and have to give relief to the assessee at least to the extent of 40% of the claim. Therefore, we are inclined to direct the AO to disallow 60% of the expenditure in place of 80% of disallowance directed by Ld. CIT(A). Accordingly, the ground raised by the assessee is **partly allowed.**

Ground No. 3

11. With regard to Ground no. 3, AO observed that assessee has earned exempt income of dividend to the tune of Rs.

29,20,172.74/- and also incurred direct expenses of Rs. 89,726/- and business charges of Rs. 1200/-, therefore assessee was asked why the disallowance u/s 14A r.w.r. 8D should not be made. In reply, assessee submitted that the investments are in the nature of stock in trade and disallowance cannot be made on such investment. Further assessee submitted that there is no expenses involved in PPF investments and all the stock does not earn dividend income. AO rejected the contentions of the assessee and proceeded to disallow the proportionate direct expenses of Rs. 21,403 and disallowed 0.5% of the average investment as per the rule 8D(2)(iii) to the extent of Rs. 7,57,715/-.

12. Aggrieved with the above order, assessee preferred appeal before Ld. CIT(A) and Ld. CIT(A) after considering the submission of assessee, sustained the addition made by AO. Aggrieved with the above order of Ld. CIT(A), assessee is in appeal before us.

13. Before us, Ld. AR brought to our notice chart of disallowance of expenditure u/s 14A from AY 2010-11 to 2013-14 and submitted similar submission which were made before

Ld. CIT(A) that the disallowance u/s 14A does not apply when the stock is in trade and on alternate plea, even the reasonable estimation may be made for that purposes. He further submitted that in order to calculate the disallowance by following rule 8D(2)(iii) of the Act only those investments which earned dividend income should be considered while calculating the expenses pertains to exempt income. He further submitted that rule of consistency should be maintained and brought to our notice that the above submissions were made in AY 2010-11 and the then AO has accepted the contentions of the assessee and completed the assessment u/s 143(3) of the Act. Similarly, in this AY also such consistency should be maintained.

14. With regard to reasonability, he brought our notice various expenses which were debited to P & L Account as per chart and he submitted that only those indirect expenses has to be considered which is relevant for the purpose of business and there is other indirect expenses which are not relevant for the business should be eliminated. He prayed that 10% of the indirect expenses as per chart may be considered for disallowance.

15. On the other hand, Ld. DR objected to the submission of Ld. AR and submitted that rule 8D has to be followed irrespective conditions or situation particularly when there is specific rule for disallowance of indirect expenses. Similarly for disallowance of the administrative expenses has to be followed as per rule and AO has consistently followed rules in disallowing the expenses in all the years.

16. Considered the rival submissions and material placed on record, we notice that assessee has earned dividend income which is exempt income during this year and we do not agree with the assessee that the exempt income which is earned out of the stock in trade, should not be considered for disallowance u/s 14A of the Act. As far as application of rule 8D(2)(iii) of the Act is concerned, we are in agreement with the tax authorities that rule 8D(2)(iii) of the Act will be applicable in the present case. The rule was inserted to disallow a particular percentage of expenses on presumption basis since there is difficulty in determining the administrative expenses and other relevant expenses which cannot be ascertained by applying proper method. However, we notice that AO while applying the rule

8D(2)(iii) has considered the total investment instead of considering only those investments which earned dividend income. In this regard we rely on the decision of Special Bench of ITAT in the case of **ACIT vrs. Vireet Investment Pvt. Ltd (ITA No. 502/Del/2012)**. Accordingly, we direct the AO to consider only those investments which earned exempt income in applying rule 8D(2)(iii) of the Act. Accordingly, ground raised by the assessee is **partly allowed**.

17. Since the facts in other appeals filed by the assessee are similar to the facts of above appeal i.e. ITA No. 5222/Mum/2018, therefore, the grounds raised in these appeals are also **partly allowed**.

18. In the net result, all the appeals filed by the assessee stands **partly allowed**.

Order pronounced in the open court on 28th Feb 2020.

Sd/-
(Pawan Singh)
न्यायिकसदस्य / Judicial Member
मुंबई Mumbai; दिनांक Dated :
Sr.PS. Dhananjay

Sd/-
(S. Rifaur Rahman)
लेखासदस्य / Accountant Member
28.02.2020

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