

आयकर अपीलीय अधीकरण, न्यायपीठ – “डी” कोलकाता,
*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH “D Virtual Court ” KOLKATA*

Before **Shri J.Sudhakar Reddy, Accountant Member** and
Shri S.S.Godara, Judicial Member

ITA No.1486/Kol/2019
Assessment Year: 2014-15

DCIT, Circle-3(1), Aaykar Bhawan, 4 th Floor, Room No. 19, P-7, Chowringhee Square, Kolkata-700 069	बनाम/ V/s.	M/s The Peerless General Finance & Investment & Co. Ltd, 3, Esplanade East, Kolkata-700 069 [PAN No.AABCT 3043 L]
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

अपीलार्थी की ओर से/By Appellant	Shri Ram Bilash Meena, CIT-DR
प्रत्यर्थी की ओर से/By Respondent	Shri S.K.Tulsian, Advocate
सुनवाई की तारीख/Date of Hearing	17-06-2020
घोषणा की तारीख/Date of Pronouncement	22-07-2020

आदेश /O R D E R

PER S.S.Godara, Judicial Member:-

This Revenue’s appeal for assessment year 2014-15 arises against the Commissioner of Income Tax (Appeals)-10, Kolkata’s order dated 28.02.2018 passed in case No.245/CIT(A)-10/Cir-3(1)/14-15/2018-19/Kol, involving proceedings 143(3) of the Income Tax Act, 1961; in short ‘the Act’.

Heard both the parties. Case file(s) perused.

2. We notice at the outset that this Revenue’s appeal suffers from 30 days’ delay in filing this appeal. The Assessing Officer has filed his condonation petition dated

17.06.2017 attributing the above delay to compilation of necessary papers and other procedural requirements. The assessee is very fair in not disputing correctness thereof. We accordingly condone the impugned delay of 30 days in filing. The case is now taken up for adjudication on merits.

3. The Revenue pleads the following substantive grounds in its instant appeal:-

“1. The Ld. CIT(A) erred in law in allowing Long Term Capital Loss of Rs.109,80,30,873/- on transfer of Government Securities after applying Cost Inflation Index cost on the sale of Government Securities. The Ld. CIT(A) erred in holding that Government Securities are not bond or debentures.

2. The Ld. CIT(A) erred in law to allow set off of brought forward long term capital loss of Rs.2,79,36,337/- against the short term capital gain computed u/s 50 of the Act.

3. The Ld. CIT(A) has erred in law in deleting the addition of Rs.67,56,925/- u/s 14A disallowance as proportionate interest of Rs.67,56,925/- was computed under Rule 8D(2)(ii) read with Rule 8D of the I.T. Rule.

4. The Ld. CIT(A) has erred in law in deleting the addition of Rs.8,93,88,975/- u/s. 14A as administrative expenses of Rs.8,93,88,975/- was computed under Rule 8D(2)(iii) read with I.T. Rule.

5. The Ld. CIT(A) has erred in law in deleting the addition of Rs.10,19,816/- u/s 40(a)(ia) of the IT Act on account of failure to deduct TDS from payments to several parties which violates the provision of Sec.194C of the IT Act.

6. The Ld. CIT(A) erred in law in allowing the Education Cess paid of Rs.1,23,28,752/- u/s 37(1) of the Act.”

4. With the able assistance of both the learned representatives, we advert to the Revenue's first substantive grievance that the CIT(A) has erred in applying cost inflation index on transfer of assessee's government securities thereby holding that the same are neither bonds nor debentures. The same is found no more *res integra* as this tribunal's decision in this taxpayer's case itself involving assessment year 2010-11 **ITA No.1439/Kol/2018** decided on 24.03.2019 held as under:-

“33. We have heard both the parties and perused the material available on record, we note that in the present case, the assessee was denied the benefit of indexation in respect of Government Securities on the behalf that Cost Inflation Index was not applicable on The

Peerless General Finance & Investment Co. Ltd. Government securities in terms of the third proviso to section 48 of the Act as these were bonds and debentures. Third proviso to section 48 read as under:

“Provided also that nothing contained in the second proviso shall apply to the long term capital gain arising from the transfer of a long term capital asset, being a bond or debenture other than

(a) capital indexed bonds issued by the Government; or

(b) Sovereign Gold Bond issued by the Reserve Bank of India under the Sovereign Gold Bond Scheme, 2015”

Here, it is of utmost relevance to discuss the meaning of '**Government Security**'. We note that the term "**Government security**" has been defined under Explanation (b) to section 194LD(2) of the Income Tax Act, 1961 as follows:

"**Government security**" shall have the meaning assigned to it in clause (b) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956)"

As per Section 2(b) of the Securities Contracts (Regulation) Act, 1956 "**Government security**" means a security created and issued, whether before or after the commencement of this Act, by the Central Government or a State Government for the purpose of raising a public loan and having one of the forms specified in clause (2) of section 2 of the Public Debt Act, 1944 (18 of 1944).

Further, section 2(2) of the Public Debt Act, 1944 defines "**Government security**" as follows:

" **Government security**" means

(a) a security, created and issued, by the Government) for the purpose of raising a public loan, and having one of the following forms, namely:

(i) stock transferable by registration in the books of the Bank; or

(ii) a promissory note payable to order; or

(iii) a bearer bond payable to bearer; or

(iv) a form prescribed in this behalf;

(b) any other security created and issued by the Government in such form and for such of the purposes of this Act as may be prescribed"

The Government securities which were sold during the year were stocks being of the nature described in clause (i) to section 2(a) of the Public Debt Act, 1944.

The third proviso to section 48 of the Act restricts the indexation in the case of long term capital assets, being bonds or debentures other than Capital Indexed Bonds issued by the Government.

The term debenture has been defined in section 2(30) of the Companies Act, 2013 which reads as "**debenture**" includes debenture stock, bonds or any other instrument of a company evidencing a debt, whether constituting a charge on the assets of the company or not"

From the above definitions, it is clear that Debenture includes Bond but it does not include Government Securities. One of the fundamental differences between "**Debenture**" on one

hand and "**Government Securities**" on the other hand is that "**Debentures**" are issued by a Company whereas "**Government Securities**" are issued by the Central or State Governments and not by any other Authority or legal entity.

The definition of '**Bonds**' and '**Government Securities**' as per the Reserve Bank of India, the following definitions are quoted from the official website of RBI i.e <https:m.rbi.org.in/Scripts/FAQView>.

What is a Bond?

1.1 A bond is a debt instrument in which an investor loans money to an entity (typically corporate or government) which borrows the funds for a defined period of time at a variable or fixed interest rate. Bonds are used by companies, municipalities, states and sovereign governments to raise money to finance a variety of projects and activities. Owners of bonds are debt holders, or creditors, of the issuer.

Investment Co. Ltd What is a Government Security (GSec)?

1.2 A Government Security (GSec) is a tradeable instrument issued by the Central Government or the State Governments. It acknowledges the Government's debt obligation. Such securities are short term (usually called treasury bills, with original maturities of less than one year) or long term (usually called Government bonds or dated securities with original maturity of one year or more). In India, the Central Government issues both, treasury bills and bond or dated securities while the State Governments issue only bonds or dated securities, which are called the State Development Loans (SDLs). GSecs carry practically no risk of default and, hence, are called risk free gilt-edged instruments.

The RBI/Government had itself adopted a different nomenclature and definition for '**Bonds**' and '**Government Securities**' as evident from the above definitions. Had Bonds and Government Securities the same, there would have been no need to define both these terms differently. The learned AO and the learned CIT(A) had not disputed the fact that the assessee has transacted in Government Securities but have only alleged that these Government Securities are in the nature of Bonds and Debentures on which indexation benefit u/s 48 of the Act is not applicable. During the course of appellate proceedings, the above definitions were explained before the learned CIT(A).

34. We note that it was also submitted during appellate proceedings that the Learned PCIT in his order u/s 263 dated 19.03.2015 had not discussed any of the contentions of the assessee claiming that Government Securities are not Bonds and Debentures. In the said order, he has not given any finding either accepting or denying the contentions of the assessee. On the other hand, in the said order passed u/s 263, he had concentrated only on the technical aspect that the assessment order for AV 201011 was erroneous and prejudicial to the interest of the Revenue since the Learned AO had not examined this question of indexation on transfer of Government Securities at the assessment stage and hence Sec.263 of the Act was applicable in the present case. He .therefore set aside the assessment order for the limited purpose of examining whether on the divestment of the Government Securities the assessee was entitled to the benefit of indexation. The assessee thereafter filed an appeal against the Learned Pr. CIT's order V/s 263 before the Hon'ble Tribunal. The assessee raised several grounds pointing out the difference between Bonds and Debentures on one hand and Government Securities on the other. The Hon'ble Tribunal did not examine these contentions and held that the learned AO did not examine this question at the assessment stage and as such uphold the orders u/s 263 passed by the Learned PCIT. However, the submissions made by the assessee were totally ignored by the learned PCIT.

We note that Learned CIT(A), has nowhere in the appellate order disputed or challenged the difference and distinction between Bonds and Debentures on one hand and Government Securities on the other as submitted by the assessee. As evident from Page 7,8,9 & 10 of the appellate order, he has made discussion under the heading "**What is Bond?**", "**What is a Government Security?**", "How do the GSec. transactions settled in primary and secondary market?" and "How does the trading in GSec. takes place in secondary market and stock exchanges?". But in all the discussions he has not tried to show how the Government Securities are Bonds and Debentures. The Id CIT(A) has referred to the definition of "**Bonds**" as appearing in Mitra's "**Legal and commercial dictionary**". In all his discussions, the Id CIT(A) has not explained how Government Securities are Bonds and Debentures. He has finally drawn the following conclusion at Pg 12 of his order, which is reproduced below:

"These cash flows traded separately as independent securities in the secondary market. From perusal of the RBI clarification also, the assessee is found to have purchased and sold the said GSecs through the secondary Market, i.e, LKP Securities Ltd and Bankers i.e, United Bank of India as per copy of confirmations placed on record by the assessee. Hence, in my considered opinion, the Govt. Securities in question, viz. GS2010 & ,GS20J2 are also bonds, as per this definition of bond as enunciated by various authorities including the guidelines of RBI. "

The Id CIT(A), has finally relied on a decision of the Hon'ble Tribunal Ahmedabad Bench in the case of Areez P. Khambatta in **ITA No.795/Ahd/2009** for AY 200506 dated 09.12.2011, wherein the Tribunal examined the question whether UTI MIP59 carrying fixed amount of interest was a Bond and Debenture. It was held that aforesaid financial instrument was Bond and therefore no benefit of indexation would be available to the assessee because the case was hit by 3rd proviso of Sec.48 of the Act. But the said order of the Tribunal did not throw any light on the dispute in the present case i.e. whether the Government Securities are Bonds & Debentures. The facts of the said case and conclusion is given below:

"Facts of this case:

Capital gains indexation benefit on debt instruments Assessee reported loss on conversion of units of UTI MIP 99 which were converted by UTI into tax free bonds prior to the actual date of redemption, after claiming benefit of indexation Tenna "**bonds**" and "**debentures**" are not defined in IT Act in case of premature withdrawal, interest already paid is deducted from capital in that sense, UTI, MIP99 is also a bond as per definition of bond Third proviso to s.48 excludes bonds and debentures other than capital indexed bonds issued by the Government from the list of capital assets eligible for the benefit of indexation CIT(A) has erred in allowing indexation on such bonds"

"UTI bonds himself to pay to the holder of MIP99, a fixed sum @ 11.3 per cent per annum in each month and to pay back the investment/capital amount after the lapse of full term of 5 years. However, in case of premature withdrawal by the assessee, there is no guarantee of protection of capital and the same will be repaid as per NAV. This is similar to FD and NSC because in case of FD and NSC, if there is premature withdrawal, penalty is levied and rate of interest is also varied being applicable to the actual period of holding and in case interest is already paid. such deduction in interest and penalty for premature withdrawal is deducted from capital. Merely for this reason, it cannot be said that repayment is not of a specified sum. Hence, UTI, MIP99 is also a bond as per this definition of bond.

Once, it is held so, the Tribunal order cited by Authorised Representative of the assessee is not applicable in the present case because in that case, the Tribunal has

proceeded on this basis that UTI MIP is not a bond or debenture without deciding or examining that aspect.

As per above discussion, it is held that UTIM 1 P99 is a bond and hence, the assessee is not eligible for indexation in view of 3rd proviso to s. 48. This ground of Revenue is **allowed**.”

35. We note that the facts of this case which is mentioned in para 34 of our order are not applicable to the present case of the assessee. In this case, UTI MIP 99 was transferred by the assessee UTI MIP99 is a bond floated by Unit Trust of India which is not a Government entity. UTI Mutual Fund is promoted by the four of the largest Public Sector Financial Institutions as sponsors, viz., State Bank of India, Life Insurance Corporation of India, Bank of Baroda and Punjab National Bank with each of them holding an 18.24% stake in the paid up capital of UTI AMC. However, in the present case, the assessee has transferred Government Securities floated by the Central Government. In this case cited by the CIT(A). There is no reference of Government Securities, as such the facts of this are clearly distinguishable from the present case.

Most importantly, to buttress the contention that indexation benefits are available on sale of Government Securities' we rely on the judgment of the Coordinate bench of Chennai Tribunal in the case of Sundaram Finance Limited vs ACIT (2017) 165 ITD 0563 (Chennai) wherein on identical facts it was held that Government Securities are entitled to indexation. The detailed facts and findings are given below:

"facts of the case:

Capital gains Short term and long term capital assets and short term and long term capital gains Deletion of addition AO disallowed indexation benefit claimed by assessee as per 3rd proviso of Sec.48 held that on sale of government securities. indexation benefit was not allowed CIT(A) deleted addition placing reliance on Explanation 2 to Section 2(42A) r/w Securities Contracts Regulation Act, 1956 and allowed appeal of assessee Revenue in appeal was related to indexation benefit on capital gains u/s 48Held, from definition of capital asset, government securities were not excluded from definition of capital asset As per Section 2(42A) expression '**security**' should had meaning assigned to Clause 11 of Securities Contracts Regulation Act, 1956 which includes government securities Bonds could not be equated with securities Assessee had made investments in government securities and sold securities after bold period of more than 12 months to treat securities as long term capital assets Capital gains arose on transfer of long term company assets were entitled for benefit of indexation as per Section 48From plain reading of 3rd proviso section 48 government securities were not excluded for indexation benefit only bond or debenture included in third proviso to Sec.48. Therefore, tribunal did not find any infirmity in order of CIT(A) and same upheld Revenue's appeal **dismissed**.

Held:

"From the definition of the capital asset, the government securities are not excluded from the definition of capital asset. Therefore, the government securities are capital assets. As per Sec.2(42A) the expression 'security' shall have the meaning assigned to Clause 11 of Securities Contracts Regulation Act, 1956 which includes government securities as discussed in the Ld.CIT(A) orders which was extracted above.

Bonds cannot be equated with the securities. The assessee has made investments in government securities and sold the securities after bolding the period of more than 12 months to treat the securities as long term capital assets. The capital gains arising on

transfer of long term company assets are entitled for the benefit of indexation as per Sec. 48 of Income Tax Act.

From the plain reading of 3rd proviso section 48 of I. T. Act, government securities are not excluded for indexation benefit only bond or debenture included in the third proviso to Sec.48. Therefore, we do not find any infirmity in the order of the Ld. CIT(A) and the same is upheld. "

Based on the factual position discussed above, we note that as per Section 2(42A) expression '**security**' shall have meaning assigned to Clause 11 of Securities Contracts Regulation Act, 1956 which includes government securities. The facts of this case are squarely applicable to the present case of the assessee. Therefore, respectfully following the judgment of the Coordinate Bench in the case of Sundarn Finance Limited (supra) we note that it is abundantly clear that Government Securities are entitled to Indexation Benefits. Therefore, we note that Government Securities are different from Bond and Debenture for the purpose of the 3rd proviso to Sec. 48 of the Act (**4th proviso after amendment**) and therefore the benefit of indexation should be granted to the assessee on the redemption of these Government Securities.

36. In the result, appeal of the assessee in ITA No.937, 938/Kol/2018 & ITA No.1439/Kol/2018 are allowed."

5. The Revenue is fair enough in not pin-pointing any distinction on facts or law in the twin assessment years. We thus adopt judicial consistency to affirm the CIT(A)'s findings under challenge. The Revenue fails in its instant first grievance.

6. Next comes the Revenue's second substantive grievance that the CIT(A) has erred in law and on facts in allowing set off of brought forward long term capital loss of ₹2,79,36,337/- against short term capital gains computed u/s 50 of the Act. There is no dispute about the basic fact that the assessee's long term capital loss in issue arose on sale / transfer of the relevant block of assets i.e. its that building only. It had also claimed depreciation thereupon in the preceding assessment years. Its computation of the consequential capital gains came to be covered u/s 50 of the Act resulting in short term capital loss as a special provision arising on sale of depreciable assets. The Revenue's only plea during the course of hearing is that such capital gains or loss; which are computed u/s 50 of the Act are not eligible for set off against long term capital gains brought forward. We find no merit in the Revenue's instant stand. Hon'ble Bombay high court's decision in *Commissioner of Income Tax vs. Ace Builders* (2006) 281 ITR 210 (Bom); as upheld in hon'ble apex court in *Commissioner of Income Tax vs. V.S.Dempo Company Ltd.* (**Civil Appeal No(s) 4797/2008**) dated

05.09.2016 holds that the impugned deeming fiction treating long term capital gains / losses as short once are applicable in specified circumstances only u/s 50 of the Act. And also that they are very much eligible for all other deduction provisions under the Act. The said hon'ble high court also held in *Commissioner of Income Tax vs. Parrys (Eastrn) (P) Ltd.* (2016) 66 taxmann.com 330 held. Such capital gains are very much entitled to be set off against the brought forward long term capital loss as held on unabsorbed depreciation. We see no reason to interfere with the CIT(A)'s findings accepting assessee's set off claim therefore. The Revenue fails in the instant second substantive ground.

7. Next is Revenue's third substantive ground seeking to restore proportionate interest and administrative expenditure disallowance of ₹67,56,925/- and ₹8,93,88,975/- under Rule 8D(2)(ii) & (iii) of the Income Tax Rules, 1946 made in the course of assessment and deleted in the lower appellate proceedings. Coming to the former limb of proportionate interest expenditure regarding its exempt income from dividends of ₹15,36,33,636/- as well as tax free interest income of ₹769,27,746/-, the CIT(A) has recorded his clinching finding of fact that its investment yielding exempt income had been derived from own funds only. The same has gone unrebutted from the Revenue side. This tribunal's co-ordinate bench decisions right from assessment year(s) 2008-09 to 2010-11, 2013-14 and 2015-16 have consistently held that the impugned proportionate interest disallowance does not apply in case of interest free funds having been invested in exempt income yielding investments. We also reiterate that this assessee has rather earned exempt interest income as well (supra). We therefore go by judicial consistency to affirm the CIT(A)'s appellate order under challenge.

The Revenue's case is not is no different *qua* the third head of administrative expenditure as well since the CIT(A) has only directed the Assessing Officer to compute the same after considering the exempt income yielding investment only as per this tribunal's order in *RIE Agro Ltd. vs. DCIT* (2013) 144 ITD 141 (Kol) as upheld in jurisdictional high court in *Commissioner of Income Tax vs.*

REI Agro Ltd. **ITAT No. 161 of 2013** dated 23.12.2013. We thus reject the Revenue's instant third substantive ground as well.

8. The Revenue's 4th substantive ground seeks to revive Sec.40(a)(ia) disallowance made by the Assessing Officer on account of assessee's failure in deducting TDS on payments made to various parties. We notice from a perusal of the case file as well as in CIT(A)'s appellate order's detailed discussion that the assessee's impugned payments pertain to either outright purchases of raw material or without involving any contractual relationship nor they exceeds amounts exceeding threshold limit of ₹30,000/- for deducting TDS. This tribunal's co-ordinate bench decision in assessment year 2013-14 involving **ITA No.1469/Kol/2019** decided on 05.12.2019 has declined the Revenue's similar argument as well. We thus adopt judicial consistency *qua* this issue in absence of any distinction on facts or law pinpoint as Revenue's behest.

9. Lastly comes educational cess disallowance of ₹1,23,28,752/- made in the course of assessment and deleted in the lower appellate proceedings. We notice that hon'ble Bombay high court's decision in *Sesa Goa Limited vs. Joint Commissioner of Income Tax ITA No. 17 and 18 of 2013* dated 28.02.2020 as well as hon'ble Rajasthan high court in *Chambal Fertilisers and Chemicals Ltd. vs. Commissioner of Income Tax ITA No.52 of 2018* dated 31.07.2018 hold that the clinching expression "cess" does not form part of sec. 40(a)(ii) of the Act so as be disallowed. We adopt the very reasoning *mutatis mutandis* hold the CIT(A)'s appellate action deleting the impugned addition

10. This Revenue's appeal is dismissed.

Order pronounced in open court on 22/07/2020

Sd/-
(लेखा सदस्य)
(J.Sudhakar Reddy)
Accountant Member

Sd/-
(न्यायिक सदस्य)
(S.S.Godara)
Judicial Member

*Dkp-Sr.PS

दिनांक:- 22/07/2020

कोलकाता / Kolkata

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

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4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता/DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।