

**IN THE INCOME TAX APPELLATE TRIBUNAL  
"B" BENCH, KOLKATA**

**BEFORE SHRI ABY T. VARKEY, JUDICIAL MEMBER  
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No. 316/Kol/2021  
Assessment Year: 2016-17**

<b>Pressman Realty Pvt. Ltd. 10A, Lee Road Bhowanipore Kolkata - 700020 PAN : AABCP6865C</b>	Vs	<b>Assistant Commissioner of Income Tax, Circle-12(2), Kolkata</b>
<b>अपीलार्थी/ (Appellant)</b>		<b>प्रत्यर्थी/ (Respondent)</b>
Assessee by :		Shri S.M. Surana, Advocate
Revenue by :		Shri Ranu Biswas, Addl. CIT, D/R

सुनवाई की तारीख/Date of Hearing : 04/04/2022  
घोषणा की तारीख /Date of Pronouncement : 28/06/2022

**आदेश/ORDER**

**PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:**

This appeal by the assessee is arising out of the order of the National Faceless Appeal Centre, Delhi [hereinafter the "ld. CIT(A)"] vide order no. ITBA/NFAC/S/250/2021-22/1034776254(1) dtd. 11.08.2021 against the order of the Assistant Commissioner of Income Tax, Circle-12(2), Kolkata passed u/s 143(3) of the Income-tax Act, 1961, [hereinafter the 'Act'] dtd. 30.11.2018.

2. Grounds of appeal reads as under:-

"1. For that the Ld. CIT(A) erred in confirming the action made by AO in disallowing 50% of the employee benefit expenses and totaling other expenses to Rs.45,58,001/-while computing the business income when no expenses were incurred to earn the rental income, nor any evidence has been brought on record to show that any expenses have been incurred for rental income, the issue has been settled in earlier years and there was no change of facts during the year under consideration.

2. For that the Ld. CIT(A) erred in disregarding the principles of consistency, when on similar facts the expenses were allowed as business expense, there is no denial of the fact that the assessee was carrying on business as is proved from the facts of the case and duly admitted by the AO himself.

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3. *For that the Ld. CIT(A) erred in confirming the action made by AO disallowing Rs.13,82,342/- in u/s 14A when no expenses was incurred for earning dividend income and even otherwise only those investments should have been taken in the formula prescribed in Rule 8D on which exempted dividend income had been earned."*

3. Ground No. 1 & 2 relate to disallowance of expenses claimed by the assessee as business expenses and Ground No. 3 relates to disallowance u/s 14A r.w.r. 8D(2)(iii).

4. Before us, Shri S.M. Surana, Advocate, appeared on behalf of the assessee and Smt. Ranu Biswas, Sr. DR represented the Department.

5. Brief facts of the case as culled out from records are that the assessee is engaged in the business of real estate and trading and investment in shares. Assessee filed its return of income reporting total income of Rs.1,15,65,280/- which comprises of business loss of Rs.1,17,08,261/- and income from house property at Rs. 98,65,281/- and short term capital gain of Rs.17,00,000/- (as contained in the computation of income placed as page nos. 11 & 12 of the paper book). There is also a dividend income of Rs.34,15,496/- claimed as exempt u/s 10(13) of the Act. It is on record that let out area given on rent by the assessee was 98.7% of the total area of the building during the year under consideration. Only 1.3% of the total area was used by the assessee for purposes other than earning rental income which is an undisputed fact.

5.1. During the course of assessment proceedings, Id. AO noted that assessee has claimed deductions towards expenses of employee benefits of Rs.24,89,307/- and other expenses of Rs.66,26,695/- (excluding rates and taxes amounting to Rs.13,11,757/-) while computing income from business. Ld. AO called for details of these expenses from the assessee to demonstrate

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how they are incidental to earning of business income and issued a show cause notice for the same.

5.2. Assessee submitted its reply by stating that it is engaged in the business of trading of shares and has reported a sale of Rs.76,85,313/- in respect of sale of shares in the audited profit and loss account placed at page 2 of the paper book. It claimed that expenses proposed to be disallowed are business expenses and relatable to the business and trading of shares. Upon examination, ld. AO noted that the expense head of "other expenses" in the Statement of Profit & Loss includes expenses incurred towards electricity charges for common area of the building, insurance, repairs and maintenance, upkeep etc. which are incidental to the earning of rental income and not the business income. Further, ld. AO by noting that since the assessee has not submitted any details of expenses which are incidental to the income earned from house property and business income, proceeded to make a disallowance to the extent of 50% of employee benefit expenses of Rs.24,89,307/- and all other expenses of Rs.66,26,695/- which were debited in the P&L account. Thus, a sum of Rs.45,58,001/-  $[(2489307 + 6626695)/2]$  was treated as expenses incidental to the business income and balance 50% as incidental to the earning of income from house property. Ld. AO also held that since 30% deduction has already been claimed by the assessee u/s 24 of the Act under the head "income from house property", no other expense was allowable under the said head of income. Accordingly, he disallowed a sum of Rs.45,58,001/- and added it back to the business income of the assessee.

5.3. On similar lines, ld. AO made a proportionate disallowance in respect of expenses towards municipal taxes paid by the assessee. Since the let out area covers 98.7% of the total area, total municipal taxes paid of

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Rs.13,11,757/- was claimed as deduction, which was restricted to 98.7% and balance of Rs.17,053/- was disallowed as not being incidental to the let out portion of the house property.

5.4. Further, ld. AO noted that assessee had earned dividend income of Rs.34,15,496/- claimed as exempt u/s 10(13) of the Act. He also noted that during the course of assessment, assessee did not submit any evidence or books of accounts to justify the nexus between the expenditure incurred and exempt dividend income earned. Ld. Further noted that assessee vide its letter dated 13.11.2018 submitted that it had not incurred any expenses for earning the dividend income. By recording his dissatisfaction, ld. AO proceeded to make a disallowance of Rs.13,82,342/- u/s 14A r.w.r. 8D(2)(iii).

6. Aggrieved, the assessee went in appeal before the ld. CIT(A).

7. Before the ld. CIT(A), assessee submitted that the claim relating to disallowance of expenses under the head "business income" was covered by the orders of the ld. CIT(A) in the assessee's own case for the assessment years 2009-10, 2010-11 & 2011-12. It was also submitted that on the same issue in the own case of the assessee, Co-ordinate Bench of the ITAT, Kolkata had held in favor of the assessee for the assessment year 2011-12. Ld. CIT(A) noted that the issue in hand is purely factual in nature and without drawing similarity with the aforesaid orders and without furnishing any details and supporting documents with respect to claim of business expenditure, the matter cannot be simply held to be covered by the aforesaid orders of preceding years. Ld. CIT(A) noted that in the aforesaid orders of the preceding years, ld. AO had disallowed 100% of the business expenditure though there was business activity in purchase and sale of shares. He further noted that in the present case, the area of building let out

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is 98.7% and only 1.3% of the area is used for business purposes. He thus, by distinguishing the facts of the present case with the facts involved in the preceding years, for which the orders were placed on record, upheld the disallowance made by the Id. AO @ 50% out of the business expenditure in the sum of Rs.45,58,001/-. On similar footing, he sustained the addition made in respect of municipal taxes. Disallowance made by the Id. AO u/s 14A of the Act was also sustained by noting that huge expenditure on account of employee benefits and other expenses were claimed as business expenditure by the assessee and the assessee failed to show that this expenditure was not incurred for earning the business income.

8. Aggrieved, assessee is in appeal before the Tribunal.

9. Before us, the Id. Counsel for the assessee reiterated the facts and arguments made before the authorities below which are not repeated for the sake of brevity.

9.1 A paper book containing 58 pages is placed on record, filed by the assessee. From a perusal of the statement of profit and loss account for the impugned year placed at page 2 of the paper book, we note that the income from operations is reported at Rs.3,83,94,806/- and sales at Rs.76,85,313/-. Details of income from operations placed in note no. 14 at page 9 of the paper book reveals that there is rental income of Rs.3,21,31,099/-, dividend income of Rs.34,15,496/-, profit on sale of investment - long term of Rs.11,02,347/- and short term of Rs.17,00,000/-, interest received is Rs.3,649/- and there are miscellaneous receipts of Rs.42,215/-. On the factual observations made by the Id. AO, in his assessment order at para 2.2, about the non-submission of any details of expenses incidental to the income from house property and business income, a specific query was

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raised by the Bench to the Id. Counsel for the assessee on which nothing was brought on record to controvert it except for placing reliance on the decisions of the appellate authorities in preceding assessment years, viz. 2009-10, 2010-11, 2011-12 and 2012-13.

10. We perused various orders for the aforesaid assessment years placed in the paper book and found that in the appellate order by Co-ordinate bench of ITAT Kolkata in the assessee's own case for AY 2009-10 in ITA No. 327/Kol/2014, dtd. 29.03.2017, issue before the Co-ordinate bench (appeal by the Revenue) as mentioned in para 2 relates to treatment of loss as business loss or capital loss, which was decided against the revenue.

Brief facts and observations dealt in this appellate order are that assessee had sold five scrips which the Id. AO considered it as yielding capital gain and not income from business. Establishment expenses of Rs.86.04 lacs were claimed to have been incurred by the assessee. Assessee submitted that owing to wide fluctuations in the stock market and general low sentiments, it consciously avoided to trade in shares in the market, instead made investments in mutual funds of Rs.3406 lacs in the year. In the assessment order placed as page 24 of the paper book, Id. AO noted that "*Assessee was asked as to why the sale of shares should not be considered as a capital gain and not a business activity of the assessee.*"

While giving its finding, the Co-ordinate bench noted in para 4 that "*When the AO has accepted in the previous assessment year that the scrips in question as stock-in-trade, the AO without valid reason cannot hold that the opening stock-in-trade has to be treated as investment.....*We note that the assessee in AY 2008-09 has treated the said five scrips purchased as stock in trade which was accepted by the AO and the same was the opening stock for the instant assessment year i.e. as on 01.04.2008, therefore, as per the Circular of

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*the CBDT, since the assessee has taken a stand that the shares are stock in trade then irrespective of the time of holding, the income arising from the transaction of such shares needs to be treated as business income. Therefore, the ld. CIT(A) has rightly treated the same as business income and we do not find any infirmity in the order of the ld. CIT(A) and therefore, we dismiss this ground of appeal of the revenue.” [emphasis supplied by us by bold and underline]*

We note that from the above finding, it is evidently clear that the issue was on treatment of shares of five scrips as ‘stock-in-trade’ or as ‘investment’, thereby treating the income therefrom as ‘capital gain’ or ‘business income’.

The other issue dealt by the Co-ordinate bench in this order in para 5 to 7 was on treatment of interest income of Rs.4,72,281/- earned by the assessee as ‘income from other sources’ or as ‘business income’. It was stated by the assessee that it is also in the business of granting loans and advances and therefore, the interest income has to be treated as ‘business income’ and not as ‘income from other sources’. It was held that “*When the fact remains that the assessee is into the business of granting of loans and advances, certainly the interest income of the assessee would be business income and the Ld. DR was unable to controvert the said fact before us. Therefore, we do not find any infirmity in the order of the Ld. CIT(A) and we dismiss this ground of appeal of the revenue.*”

10.1. In the appellate order by the ld. CIT(A) for AY 2010-11, similar issue on treatment of loss as business loss or short term capital loss was adjudicated upon in the light of the appellate order of CIT(A) dated 19.11.2013 for AY 2009-10. This order of CIT(A) for AY 2009-10 was the subject matter of appeal by the Revenue before the Co-ordinate bench of ITAT Kolkata for AY 2009-10 (supra). In this order of CIT(A) for AY 2010-11, ld. CIT(A) noted in para 3 (placed at page 30 of the paper book) that

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*“Appellant has also relied on Circular No. 6 of 2016 dated 29/02/2016 wherein CBDT has stated that where the assessee itself, irrespective the period of holding the listed shares and securities, opts to treat them as stock in trade, the income arising from transfer of such shares/securities would be treated as its business income. Assessee has further submitted that it has been consistently treating share trading income as business income.”*

We note that from the above observations and finding that the issue was on treatment of income from trading of shares as ‘capital gain’ or ‘business income’ which was adjudicated upon by placing reliance on the first appeal order of the preceding year i.e. AY 2009-10, which was later affirmed by the Co-ordinate bench.

10.2. For AY 2011-12, in assessee’s own case before the Co-ordinate Bench of ITAT, Kolkata in ITA No. 2412/Kol/2016 order dtd. 13.04.2018, we note that Id. AR had relied on the order of the Co-ordinate Bench of ITAT Kolkata in the assessee’s own case for AY 2009-10 (supra) and argued that the Tribunal held the stock of shares as stock-in-trade.

In para 3 of this order, it is noted that *“The Id. AR submits that the issue involved in A.Y. 2009-10 and in the year under consideration are identical and supported the order of CIT(A).”*

While arriving at the decision, the Co-ordinate bench noted in para 4 (placed at page 34 of the paper book), *“We note that the order of CIT(A) for A.Y. 2009-10 was challenged before the Tribunal and the Tribunal considered the treatment of stocks as held by the assessee as stock-in-trade and upheld the order of CIT(A) in computing the income of the assessee from business.....Para 5. In view of the same we do not find any infirmity in the order of CIT(A) and accordingly the appeal is dismissed.”*

In this case, the important fact was that revenue to an extent of 83% was earned by the assessee from service charges which was computed under the head "income from house property" as against 98.7% of the area let out in the present case for AY 2016-17 under consideration before us.

We note that from the above observations and finding that the issue was on treatment of income from trading of shares as 'capital gain' or 'business income' which was adjudicated upon by placing reliance on the order of the Co-ordinate bench for preceding year i.e. AY 2009-10 which has been elaborately discussed above.

10.3. There is an appellate order by Id. CIT(A)-4, Kolkata for AY 2012-13, dtd. 18.07.2019 placed at page 45 of the paper book wherein the trading under business of shares includes purchases amounting to Rs.11,72,92,977/- and sales amounting to Rs.11,09,36,391/-. In this case, Id. AO disallowed 100% of the expenses of Rs.1,49,17,406/- claimed as business expenses on the ground that the assessee had no business. Id. CIT(A) allowed the appeal of the assessee by following the decision of the Co-ordinate Bench of ITAT, Kolkata in the assessee's own case for AY 2009-10 & 2011-12 by holding that matter is squarely covered in favor of the assessee.

While adjudicating on the ground no. 7 relating to disallowance u/s 14A, Id. CIT(A) noted that there is no exempt income earned by the assessee and thus by placing reliance on the decision of Hon'ble Supreme Court in the case of *CIT v. Chettinad Logistics Pvt Ltd [2018] 95 taxmann.com 250 (SC)* held that when there is no exempt income earned by the assessee, no disallowance u/s 14A can be made. However, from the perusal of the assessment order placed at page 49 of the paper book, we note on page 50

from the tabulation of income from operations that it includes 'dividend on long term investment of Rs.5,11,904/-' claimed as exempt income.

We further observe from the perusal of the assessment order for AY 2012-13 placed in paper book at page no. 49 that ld. AO on a microscopic examination noted that certain expenses claimed as business expenditure are in fact expenses related to earning of income from house property, details of which is tabulated as under:-

<i>Remuneration &amp; professional charges</i>	
R.L. Sureka - Rs.6,45,000/-	<i>Chartered Accountant</i>
<i>Electricity Charges - Rs.3,38,071/- for let out premises</i>	
<i>Office upkeep &amp; maintenance charges</i>	
<i>Night Guard for Office</i> -	Rs. 74,500/-
<i>Painting and repairing office</i> -	Rs.1,61,400/-
<i>Maintenance of Roof Garden</i> -	Rs.1,21,285/-
<i>Miscellaneous Expenses</i> -	Rs.33,21,954/-
<i>Donation :</i> -	Rs.17,00,000/-
<i>Donation is paid to Shri Harsha Chand Padmabati Suchanti Charitable Trust in which promoter Dr. Niren Chand Suchanti, Mrs. Sujata Suchanti, Mr. Navin Chand Suchanti and Mrs. Purnima Suchanti are trustees.</i>	

11. From the perusal of orders of the appellate authorities for the preceding assessment years i.e., A.Y. 2009-10 to 2012-13, we find that the ld. CIT(A) in the present case has rightly noted that the instant issue is purely factual in nature and by merely submitting the orders of the ld. CIT(A) and Co-ordinate bench of ITAT for the preceding years, without drawing similarities, is not a valid and substantial documentary evidence for accepting the claim of the assessee.

12. In the conspectus of above factual analysis of the orders of preceding years relied upon by the assessee, we note that there are factual differences which are predominantly centered on treatment of shares as 'stock-in-trade'

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or as 'investment' thereby resulting into treatment of its income as 'business income' or 'capital gain'. Furthermore, there is a categorical finding by Id. AO in the assessment order for the impugned year that assessee did not furnish any details/supporting documents with respect to the business expenditure related to rental income/business income. Ld. CIT(A) further noted that 98.7% of the area is let out and only 1.3% is used for business purposes which is an undisputed fact and therefore there is no rationality and justification on account of expenses incurred towards employee benefits and other expenses which would relate only to the business. Ld. CIT(A) also noted that a standard deduction @ 30% has already been claimed by the assessee and allowed under the head income from house property. This standard deduction of 30% from the rental receipts is allowed under the Act on account of repairs and maintenance expenses which has been otherwise claimed by the assessee as business expenses by debiting them in the profit and loss account for which no details and supporting documents were furnished.

12.1. Thus, in the present facts and circumstances of the case, where assessee did not furnish relevant supporting documents, the Id. CIT(A) proceeded to uphold the disallowance @ 50% made by the Id. AO out of the business expenditure, which according to us does not call for any interference. We hold so, more particularly when there was a specific query from the Bench on this aspect and the Id. Counsel for the assessee without controverting it by bringing any material on record, chose only to place strong reliance on the orders of the Id. appellate authorities for the preceding years, which are distinguishable on facts as elaborated above, year on year basis.

13. During the course of hearing, Id. Counsel for the assessee placed reliance on the decision of Hon'ble Delhi High Court in the case of *CIT v. Neo Poly Pack(P) Ltd.* 245 ITR 492(Del), wherein it was held as under:-

*"It is true that each assessment year being independent of each other, the doctrine of res judicata does not strictly apply to the income-tax proceedings, but where an issue has been considered and decided consistently in a number of earlier assessment years in a particular manner, for the sake of consistency, the same view should continue to prevail in the subsequent years **unless there is some material change in facts. In the present case, the learned counsel for the revenue has not been able to point out even a single distinguishing feature in respect of the assessment year in question which could have prompted the assessing officer to take a view different from the earlier assessment years in which the same income was brought to tax as income from business.**"*

*[Emphasis supplied by us by bold and underline]*

13.1. From the financial statements of the assessee for the impugned year, we observe from Note 9 placed at page 8 of the paper book that it gives details about 'Long Term Investment Non-trade' as on 31.03.2016 which is reported at Rs.28,63,02,209. In Note 10, details of 'Long Term Loans and Advances' shows Rs.4,75,621/- only under the sub-head of 'security deposits' and 'nil' for 'long term advances' and 'other advances', as on 31.03.2016. There is no 'stock-in-trade' reported in the Balance Sheet under the head 'Current Assets/Current Investments', nor in the Note 11, 12 and 13 to the said Balance Sheet as on 31.03.2016. We, thus, find that there is no stock-in-trade of shares nor there are any loans and advances given by the assessee relating to its claim of business activities.

13.2. In the computation of income for the year under consideration, placed at page 11 of the paper book, income from long term capital gain on sale of investment of Rs.11,02,347/- and dividend income of Rs.34,15,496/- is claimed as exempt and income of Rs.17,00,000/- is reported as short term capital gain.

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13.3. Based on the above decision, rule of consistency has to be followed, unless there is a change in the factual matrix of the case. As noted above, there are factual differences which are observed from perusal of the appellate orders of the preceding years and the financial statements for the year under consideration, more particularly when in the preceding years, the issue was centered towards treatment of loss and shares as business loss or capital loss and stock-in-trade *v.* investment, respectively.

14. To our mind, both, ld. CIT(A) and the ld. AO have taken a rational approach by making a disallowance to an extent of 50% of the expenses claimed as business expenses, more particularly in a given situation where the issue of non-submission of details of expenses along with supporting documents has not been controverted by the assessee except for embarking upon the appellate orders of preceding years without bringing on record, similarities in the facts and issues dealt therein and when 98.7% of the total area of the building has been let-out for earning rental income and only 1.3% is available otherwise. Accordingly, ground of appeal no. 1 and 2 of the appeal by the assessee are dismissed.

15. Ground No. 3 relates to disallowance of Rs.13,82,342/- made u/s 14A r.w.r. 8D(2)(iii). Ld. Counsel for the assessee submitted that no expenditure was incurred to earn exempt dividend income of Rs. 34,15,496/-. We note that this issue is no longer *res integra* and is covered by the decision of the Hon'ble Jurisdictional High Court of Calcutta in the case of *CIT v. REI Agro Ltd. in GA No. 3022 of 2013 & ITAT No. 161 of 2013* which has upheld the findings of the ITAT by holding that only those investments could be considered for the purposes of disallowance under rule 8D(2)(iii) which had yielded tax free dividend income during the year. Respectfully following the decision of the Hon'ble Jurisdictional High Court, we find it proper to

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remit this specific issue to the file of the Id. AO for the limited purpose of verification and to re-compute the disallowance under Rule 8D(2)(iii) by considering the decision of the Hon'ble Jurisdictional High Court in the case of *REI Agro Ltd. (supra)*. Accordingly, this ground no. 3 of appeal by the assessee is allowed for statistical purposes.

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

**Order pronounced in the Court on 28th June, 2022 at Kolkata.**

**Sd/-**

**(ABY T. VARKEY)  
JUDICIAL MEMBER**

**Sd/-**

**(GIRISH AGRAWAL)  
ACCOUNTANT MEMBER**

Kolkata, Dated 28 /06/2022

*\*SC SpA*

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, अधिकरण अपीलीय आयकर , Kolkata/DR,ITAT, Kolkata
6. गार्ड फाईल /Guard file.

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Assistant Registrar  
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