

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

SHRI B.R. BASKARAN, ACCOUNTANT MEMBER  
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 3175/MUM/2017  
(Assessment Year: 2012-13)

Income Tax Officer-3(3)(2),  
Room No. 602, 6<sup>th</sup> Floor,  
Aayakar Bhavan, M.K. Road,  
Mumbai - 400020

..... Appellant

M/s Satya Securities Ltd.,  
1009, Maker Chamber-V, 10<sup>th</sup> Floor,  
Nariman Point, Mumbai - 400021  
[PAN: AAEC59414M]

Vs

..... Respondent

For the Appellant/Department : Shri A.K. Das  
For the Respondent/Assessee : Shri A.K. Tibrewal & Saurabh Gupta

Date of conclusion of hearing : 15.11.2022  
Date of pronouncement of order : 31.01.2023

**ORDER**

**Per Rahul Chaudhary, Judicial Member:**

1. By way of the present appeals the Revenue has challenged the order, dated 28/01/2017, passed by the Ld. Commissioner of Income Tax (Appeals)-8, Mumbai [hereinafter referred to as 'the CIT(A)'] for the Assessment Year 2012-13, whereby the Ld. CIT(A) had partly allowed the appeal against the Assessment Order, dated 30/03/2015 passed under Section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').
2. The Revenue has raised following grounds of appeal:
  - "1. *Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) was right in deleting the addition of Rs. 2,27,41,298/- made u/s 68 of the I.T.*

*Act, 1961 on account of unsecured loans obtained.*

2. *Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the disallowance of Rs. 4,45,274/- without appreciating the fact that the amount of disallowance u/s14A of the I.T. Act, 1961 has to be computed as per Rule 8D of the I.T. Rules, 1962 when the computation of the assessee was not found to be correct and as held in the order of the Hon'ble High Court in the case of M/s Godrej & Boyce Manufacturing Co. Ltd.*
  3. *The appellant prays that the order of CIT(A) on the above ground be set aside and that of the Assessing Officer be restored."*
3. The relevant facts, in brief, are that Assessee is closely held public limited engaged in the business of trading shares & securities, and making investment in shares, debentures, bonds etc. The Assessee filed return of income for the Assessment Year 2012-13 on 29/09/2012 declaring 'Nil' income after claiming set off in respect of the brought forward loss of INR 2,53,143/-. The case of the Assessee was selected for scrutiny. The Assessing Officer completed the assessment vide Assessment Order, dated 30/03/2015, passed under Section 143(3) of the Act. The Assessing Officer, inter alia, made in the disallowance of INR 4,45,274/- under Section 14A of the Act and an addition of INR 2,27,41,298/- under Section 68 of the Act. The Assessee preferred appeal before the CIT(A) against the Assessment Order and challenged, inter alia, the aforesaid disallowance/addition made by the Assessing Officer. The CIT(A) partly allowed the appeal. The aforesaid disallowance under Section 14A and the addition under Section 68 of the Act were deleted. The Revenue is now in appeal before us against

the aforesaid relief granted by the CIT(A).

**Ground No.1**

4. Ground No. 1 raised by the Revenue pertains to the order of the CIT(A) deleting the addition of INR 2,27,41,290/- made by the Assessing Officer under Section 68 of the Act holding the same to be unexplained cash credit.
  
5. During assessment proceedings the Assessee was asked to furnish details of unsecured loans. The assessing officer noted that during the relevant previous year the Assessee had received fresh loan of INR 2,27,41,298/- from M/s Basant Marketing Private Limited (BMPL). The Assessee had also made payment of INR 3,94,27,000/- during the relevant previous year towards repayment of the outstanding loan. According to the financial statements of the Assessee-company, outstanding credit balance of INR 23,06,282/- stood in the name of BMPL. The Assessee was asked to furnish loan confirmations, copy of income tax returns and bank statements to prove the identity, genuineness and creditworthiness of the loan creditors/transaction. In response, the Assessee furnished the aforesaid documents/details. However, the Assessing Officer was not satisfied and concluded that the Assessee had failed to discharge the onus of proving the genuineness of the transaction and creditworthiness of the lender (i.e. BMPL). The Assessing Officer noted that the Assessee and BMPL were part of the same group of companies, managed and control by Sh. Harsh Dalmia and Arun Dalmia. Placing reliance upon the letter dated 12/12/2013 received from the assessing officer of BMPL the Assessing Officer concluded that BMPL was engaged in the business of providing accommodation entries by way of bogus

purchases and loans transactions to various beneficiaries. The Assessing Officer also took note of the fact that a search action was carried out by CBI-ACB, Mumbai at the premises of Sh. Arun Dalmia and Sh. Harsh Dalmia during which it was found that 20 companies were floated by them which were engaged in showing bogus purchase and sale of software. In the aforesaid facts and circumstances the Assessing Officer made an addition of INR 2,27,41,298/-, being fresh loan taken from BMPL during the relevant previous year, under Section 68 of the Act.

6. Being aggrieved the Assessee carried the issue in appeal before CIT(A). In the appellate proceedings before the CIT(A) it was contended on behalf of the Assessee that the findings of the Assessing Officer were based upon conjecture and surmise. The Assessing Officer had relied upon the assessment order passed in the case of BMPL for the assessment year 2010-11. However, the findings given by the Assessing Officer in the aforesaid assessment order have been overturned in appeal by the CIT(A) – 20, Kolkatta. The order passed by the CIT(A)-20, Kolkatta has been accepted by the Revenue and no appeal has been preferred against the same. A copy of the order passed by CIT(A)-20, Kolkatta was also placed on record. It was also contended that the Assessee had furnished all the relevant documents/details desired by the Assessing Officer and had, therefore, discharged the onus cast upon the Assessee. It was also brought to the knowledge of the CIT(A) that BMPL has been regularly assessed to tax and for the Assessment Year 2012–13 the assessment order was passed on 27/03/2015 after scrutiny under section 143(3) of the Act. Taking note of the aforesaid, the CIT(A) deleted the addition of INR 2,27,41,298/-

made by the Assessing Officer under Section 68 of the Act by placing reliance upon his own order, dated 25/8/2016, passed in appeal for the Assessment Year 2005 – 06.

7. Being aggrieved the Revenue is now in appeal before us.
8. The Learned Department Representative relied upon the Assessment Order and took us through the findings recorded by the Assessing Officer therein. Per contra Learned Authorised Representative for the Assessee reiterated the submissions made before the CIT(A) and supported the order passed by the CIT(A).
9. We have heard the rival submission and perused the material on record. On perusal of the Assessment Order we find that while the assessing officer has made a reference to the search action conducted by the CBI – ACB, Mumbai, the basis of addition of INR 2,27,41,298/- made by the Assessing Officer under section 68 of the Act was the assessment order passed in the case of the BMPL for the Assessment Year 2010-11 which has since been overturned by the CIT(A) 20, Kolkatta vide order dated 30.01.2015 (*placed at page 95 to 120 of the paper-book*). Further, the order passed by CIT(A) -20, Kolkatta in appeal has also been accepted by the Revenue. A status report, dated 23.02.2016, to this effect has also been placed at page 86 of the paper-book. The averment made on behalf of the Assessee that BMPL is being assessed to tax on a regular basis has not been controverted. Further, there is nothing on record to show that the order passed by the CIT(A) for the Assessment Year 2005-06 on which the reliance was placed by granting relief to the Assessee in appeal for the assessment year before us has, since, been overturned.

10. In view of the above, we do not find any infirmity in the order passed by the CIT(A) on this issue. Accordingly, Ground No. 1 raised by the Revenue is dismissed.

Ground No. 2

11. Ground No. 2 pertains to the disallowance of INR 4,45,274/- made under Section 14A of the Act. During the assessment proceedings it was submitted by the Assessee that no direct expenditure was incurred in relation to earning tax exempt income. However, the Assessing Officer rejected the aforesaid contention and proceeded to compute disallowance by invoking provisions of Section 14A of the Act read with Rule 8D of the Income Tax Rules, 1962 (hereinafter referred to as 'the Rules'). In appeal, the CIT(A) restricted the disallowance to Dmat charges/STT/direct expenses, if any, on the ground that the share and units of mutual funds were held as stock-in-trade by following the order, dated 25/08/2016 passed by the CIT(A) in appeal for the Assessment Year 2008-09.
12. We note that while deciding a batch of Special Leave Petitions filed before the Hon'ble Supreme Court, vide judgment dated 12.02.2018, passed in the case of Maxopp Investments Ltd vs. CIT [2018] 402 ITR 640, has held as under:

*"36. There is yet another aspect which still needs to be looked into. What happens when the shares are held as 'stock-in-trade' and not as 'investment, particularly, by the banks? On this specific aspect, CBDT has issued circular No. 18/2015 dated November 02, 2015.*

*37. This Circular has already been reproduced in Para 19 above. This Circular takes note of the judgment of this Court in Nawanshahar case wherein it is held that investments made by a banking concern are part of the*

*business or banking. Therefore, the income arises from such investments is attributable to business of banking falling under the head 'profits and gains of business and profession. On that basis, the Circular contains the decision of the Board that no appeal would be filed on this ground by the officers of the Department and if the appeals are already filed, they should be withdrawn. A reading of this circular would make it clear that the issue was as to whether income by way of interest on securities shall be chargeable to income tax under the head 'income from other sources' or it is to fall under the head 'profits and gains of business and profession'. The Board, going by the decision of this Court in Nawanshahar case, clarified that it has to be treated as income falling under the head 'profits and gains of business and profession'. The Board also went to the extent of saying that this would not be limited only to co-operative societies/Banks claiming deduction under Section 80P(2)(a)(i) of the Act but would also be applicable to all banks/commercial banks, to which Banking Regulation Act, 1949 applies.*

*38. From this, Punjab and Haryana High Court pointed out that this circular carves out a distinction between 'stock-in-trade' and 'investment' and provides that if the motive behind purchase and sale of shares is to earn profit, then the same would be treated as trading profit and if the object is to derive income by way of dividend then the profit would be said to have accrued from investment. To this extent, the High Court may be correct. At the same time, we do not agree with the test of dominant intention applied by the Punjab and Haryana High Court, which we have already discarded. In that event, the question is as to on what basis those cases are to be decided where the shares of other companies are purchased by the assesseees as 'stock-in-trade' and not as 'investment'. We proceed to discuss this aspect hereinafter.*

*39. In those cases, where shares are held as stock-in-trade, the main purpose is to trade in those shares and earn profits therefrom. However, we are not concerned with those profits which would naturally be treated as 'income' under the head 'profits and gains from business and profession'. What happens is that, in the process, when the shares are held as 'stock-in-trade', certain dividend is also earned, though incidentally, which is also*

an income. However, by virtue of Section 10(34) of the Act, this dividend income is not to be included in the total income and is exempt from tax. This triggers the applicability of Section 14A of the Act which is based on the theory of apportionment of expenditure between taxable and non-taxable income as held in Walfort Share & Stock Brokers (P.) Ltd. case. Therefore, to that extent, depending upon the facts of each case, the expenditure incurred in acquiring those shares will have to be apportioned.

40. We note from the facts in the State Bank of Patiala cases that the AO, while passing the assessment order, had already restricted the disallowance to the amount which was claimed as exempt income by applying the formula contained in Rule 8D of the Rules and holding that section 14A of the Act would be applicable. In spite of this exercise of apportionment of expenditure carried out by the AO, CIT(A) disallowed the entire deduction of expenditure. That view of the CIT(A) was clearly untenable and rightly set aside by the ITAT. Therefore, on facts, the Punjab and Haryana High Court has arrived at a correct conclusion by affirming the view of the ITAT, though we are not subscribing to the theory of dominant intention applied by the High Court. It is to be kept in mind that in those cases where shares are held as 'stock-in-trade', it becomes a business activity of the assessee to deal in those shares as a business proposition. Whether dividend is earned or not becomes immaterial. In fact, it would be a quirk of fate that when the investee company declared dividend, those shares are held by the assessee, though the assessee has to ultimately trade those shares by selling them to earn profits. The situation here is, therefore, different from the case like Maxopp Investment Ltd. where the assessee would continue to hold those shares as it wants to retain control over the investee company. In that case, whenever dividend is declared by the investee company that would necessarily be earned by the assessee and the assessee alone. Therefore, even at the time of investing into those shares, the assessee knows that it may generate dividend income as well and as and when such dividend income is generated that would be earned by the assessee. In contrast, where the shares are held as stock-in-trade, this may not be necessarily a situation. The main purpose is to liquidate

*those shares whenever the share price goes up in order to earn profits. In the result, the appeals filed by the Revenue challenging the judgment of the Punjab and Haryana High Court in State Bank of Patiala also fail, though law in this respect has been clarified hereinabove."(Emphasis Supplied)*

13. On perusal of the above, it is clear that the Hon'ble Supreme Court clarified that earning of exempt dividend income in respect of shares held as stock-in-trade, though incidental or by quirk of fate, triggers the provisions of Section 14A of the Act. Therefore, based upon the theory of apportionment of expenditure between taxable and non-taxable income as held by the Hon'ble Supreme Court in the case of CIT Vs. Walfort Share and Stock Brokers P. Ltd [2010] 326 ITR 1 (SC), the expenditure incurred in acquiring such shares which are held as stock-in-trade would have to be apportioned. The Hon'ble Supreme Court discarded the theory of dominant intention adopted by the Hon'ble Punjab & Haryana High Court. However, the Hon'ble Supreme Court held that the decision arrived at by the Hon'ble Punjab & Haryana High Court was correct on facts as the Assessing Officer had restricted the disallowance under Section 14A of the Act to the amount of exempt income whereas the CIT(A) had erred in disallowing the entire amount of expenditure despite the apportionment expenditure having been done by the Assessing Officer.
14. We note that the total exempt dividend income earned by the Appellant during the relevant previous year of INR 10,67,600/- Assessing Officer made a disallowance of INR 4,45,274/- under Section 14A of the Act read with Rule 8D which constitutes around 42% of the exempt income. Whereas the CIT(A) restricted the disallowance to actual direct expenses holding

that no disallowance is required to be computed in terms of Section 14A read with Rule 8D(2)(ii)/(iii). In effect the CIT(A) computed the disallowance at 'Nil' since no direct expenses were incurred by the Appellant as per the Assessing Officer. Keeping in view, the above judgment of the Hon'ble Supreme Court and the facts of the case, we hold that 10% of the exempt income as fair apportionment representing expenses attributable to earning exempt income. In terms of the aforesaid Ground No. 2 raised by the Revenue is partly allowed.

Ground No. 3

15. In Ground No. 3 Revenue has sought remand of the issues raised in appeal. We have dismissed Ground No.1 and have partly allowed Ground No.2. Accordingly, Ground No. 3 raised by the Revenue is disposed off as being infructuous.
16. In the result, the present appeal is partly allowed.

Order pronounced on 31.01.2023.

*Sd/-*  
(B.R. Baskaran)  
Accountant Member

*Sd/-*  
(Rahul Chaudhary)  
Judicial Member

मुंबई Mumbai; दिनांक Dated : 31.01.2023  
*Alindra, PS*

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai