IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "E" DELHI

BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER
&
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

I.T.A. No.1010/DEL/2019
Assessment Year 2013-14

Justice Mohan Lal Verma (Retd.) A-124, Niti Bagh, New Delhi.	Vs.	ACIT, Circle-63(1), New Delhi.
TAN/PAN: AACPV5024D		
(Appellant)		(Respondent)

Appellant by:	Shri B.K. Anand, FCA		
Respondent by:	Shri Subhra Jyoti Chakraborty, CIT-DR		
Date of hearing:	30	08	2023
Date of pronouncement:	20	09	2023

O R D E R

PER PRADIP KUMAR KEDIA, A.M.:

The captioned appeal has been filed by the assessee against the order of the Commissioner of Income Tax (Appeals)-XXVII, New Delhi ['CIT(A)' in short] dated 27.11.2018 arising from the assessment order dated 19.02.2016 passed by the Assessing Officer (AO) under Section 143(3) of the Income Tax Act, 1961 (the Act) concerning AY 2013-14.

2. The grounds of appeal raised by the assessee read as under:

"1. That the ld. CIT(A) erred in confirming the addition of Rs.93,736/- to the returned income u/s.14A with complete disregard to the order of Honourable Members ITAT Bench "A", New Delhi in assessee's own case in ITA No.864/Del/2016 on same facts and issue.

2(a) That the authorities below erred in disallowing the assessee's claim for Long Term Capital Loss of Rs.18,68,720 in respect of the

property at Crossing Republic, Ghaziabad.

2(b) That the learned CIT(A) further erred in holding that the cost of acquisition of the asset had to be split over two periods and further erred in holding that the gain would be assessable as "short term capital gain" without affording the assessee an opportunity to produce clinching documentary evidence to rebut such a conclusion of the CIT(A) who did not even confront the assessee nor raised this issue during the Appellate proceedings and more particularly so when this issue was not even raised by the AO and therefore bad in law and in violation of the principles of natural justice."

3. Ground No.1 concerns addition of Rs.93,736/- on account of administrative expenses under Section 14A of the Act read with Rule 8D(2)(iii) of the IT Rules. The ld. counsel for the assessee at the outset submits that the issue is squarely covered in favour of the assessee in its own case concerning Assessment Year 2012-13 in ITA No.864/Del/2016 order dated 31.01.2018. It was pointed out that on a bare perusal of the P&L account of the assessee, it can be noticed that no expenses have been incurred which has any relation to the corresponding exempt income by way of dividend on mutual funds and shares as noted in the earlier year by the Co-ordinate Bench on similar facts. The ld. counsel further pointed out that majority of the dividend is attributable to investment in mutual funds which are supervised by the experts of the field and management charges for such supervision are recovered from the investors and hence no separate expenses are incurred by the investor-assessee while placing funds with the mutual funds giving rise to dividend income.

4. We find that the issue has been examined by the Co-ordinate Bench in favour of the Assessee. Besides, the disallowance under Section 14A with reference to investment in mutual funds has been answered in favour of the assessee in the case of *M/s.*

Academy For Computer Training (Guj) Pvt. Ltd. vs. DCIT in ITA No.3065/Ahd/2013 order dated 30.11.2016. The Co-ordinate Bench has addressed the issue of disallowance under Section 14A in relation to the mutual funds in following terms;

> *"10. We have carefully considered the rival submissions, perused the material available on record and gone through the orders of the authorities below. The solitary issue in the present appeal is disallowance of certain expenditure by resorting to section 14A of the Act. We find that averment made on behalf of the assessee that the own capital together with reserves held by the assessee are in excess of corresponding investment is supported by the balance-sheet filed by the assessee. There is no rebuttal from the Revenue in this regard. In view of the long line of judicial precedents on the issue, we find merit in the contention of the assessee that proportionate disallowance of expenditure under Rule 8D(2)(ii) is not justified where the interest-free own capital together with reserves exceeds the corresponding investment. With reference to the disallowance made by the AO under Rule 8D2(iii) agitated by the assessee, we notice the averments made on behalf of the assessee that in tax-free income by way of dividend arises entirely out of mutual funds which are one time single investments without any proactive involvement of the management per se. The surplus fund of the company has been simply parked in the mutual funds. We take cognizance of the argument on behalf of the assessee that mutual funds investment bears different traits and is a different species of investment. The mutual funds are supervised by the experts in the field and management charges for such supervision is recovered from the clients. This being so, an investor in the mutual fund separately pays administrative and managerial expenses unlike a case where assessee chooses to make investment in shares directly. In the case of a mutual funds, administrative and managerial expenses are factored in the investments itself. In such a scenario, the explanation offered by the assessee of no expenditure incurred appears to be in congruity with the market practice. Accordingly, we do not find it a fit case for resorting to double disallowance of the similar expenditure in the garb of Rule 8D(iii) of the IT Rules. It will be pertinent to note that a bare reading of section 14A of the Act suggests that its applicability is not automatic. It is hedged by conditions prescribed therein. Section 14A inheres in it the concept of reasonableness. The formidable amount of expenditure as computed by the AO cannot be said to be attributable to tax-free income by applying a straight jacket formula as per Rule 8D(2)(iii) of the IT Rules in the given facts. Thus, we find considerable merit in the plea of the assessee. Hence, we are disposed to adjudicate the issue in favour of the*

assessee. Thus, order of the CIT(A) sustaining the disallowance section 14A deserves to be vacated."

5. We thus find merit in the plea of the assessee for reversal of disallowance under Section 14A in the facts of the case.

6. Ground No.1 is accordingly allowed.

7. Grounds No.2(a) and 2(b) concerns disallowance of Long Terms Capital Loss of 18,68,720/- claimed in respect of property at Crossing Republik Ghaziabad.

8. Brief facts as pointed out on behalf of the assessee concerning the issue are that the assessee in the year 2006 booked a flat under construction with developer M/s. Crossing Infrastructure Pvt. Ltd. (CIPL) on 24.04.2016. The assessee paid amount of Rs.2,56,000/- as an application money and thereafter made further payments between 2006 and 2010. The purchase consideration was determined @ 1600 per sq. ft. on an area 1725. The total purchase cost including incidental charges were determined at Rs.31,26,118/- by the assessee. The assessee is claimed to have surrendered its right in the flat on 12.04.2012 in favour of one Mr. Rajnish Mantri through surrender to the developer with a request to re-allot the flat to Mr. Mantri. The total sale consideration was determined by the assessee at Rs.32,96,173/- out of which Rs.28,46,460/- were received from the builder on surrender and Rs.4,49,713/- was received directly from the proposed buyer Mr. Rajnish Mantri. The assessee claimed the gains/loss arising from surrender of allotment in favour of third party as Long Term Capital Gain/loss and for computation of such gains, the assessee applied indexation on the cost of acquisition by way of allotment in April, 2006 as per

proviso to Section 48 of the Act. On indexation of cost of acquisition, the assessee determined capital loss at Rs.18,68,720/- which was claimed to be carried forward. The Assessing Officer at the time of scrutiny assessment did not compute any loss but instead disallowed the benefit of loss claimed holding that there was no amount which could be assessed to tax as capital gain in the absence of any allotment letter produced etc. The Assessing Officer further added Rs.4,49,713/- being the amount received from third party to the returned income.

9. In the first appeal, the CIT(A) validated the stand of the assessee that such transactions of surrender of allotment in favour of the third party resulted in capital gains to the assessee and also observed that Rs.4,49,713/- received from third party was also to be taken as part of sale consideration and cannot be assessed separately as wrongly done by the Assessing Officer. The CIT(A) however observed the claim of the assessee that the allotment was carried out on 24.04.2006 was incorrect. The CIT(A) thus rejected the claim of the assessee towards date of allotment of 28.04.2006. The assessee pointed out before the CIT(A) that the allotment was originally made for flat no. 9046 which was changed to flat no. 9064 on 29.03.2008 with same area, costs and terms and conditions and other specifications. However since the original documents for flat no.9046 (allotment letter, NOC letter of the builder for mortgage and payment receipts) were lying with the bank as collateral for raising the loan *qua* flat no. 9046, the exchange could have been done only when the documents were returned by the bank on closure of bank loan on 01.02.2010. The CIT(A) however held that amended right in flat no.9064 came into existence on 01.02.2010 only and not before. The CIT(A) also

observed that the total payment made upto 01.02.2010 was Rs.27,72,000/- only and this amount should be treated as cost of acquisition. The CIT(A) thus in essence treated the transfer of allotment to third party as Short Term Capital Asset and gain arising therefrom was directed to be taxed as Short Term Capital Gain by the Assessing Officer on the basis of modified cost of acquisition. The indexation benefit was thus denied as the asset held by way of allotment right was treated to be Short Term Capital Asset.

10. In rebuttal of the aforesaid findings of the CIT(A), the assessee before us submitted that the assessee had obtained a letter from builder dated 29th March, 2008 in acknowledgement of the fact that flat no. 9046 stood changed to 9064. The assessee contends that it was only on account of the documents in the possession of the bank, a formal allotment letter could not be issued as the assessee was prevented from surrendering the original allotment letter. However, the developer had confirmed the factum of change in flat number in March, 2008 on the same terms and conditions as original allotment. Thus, the date of allotment should be reckoned w.e.f. 29.03.2008 and not later.

11. We find that the Co-ordinate Bench in the case of *ITO vs. Smt. Tripta Shahani in ITA No. 459/LKW/2009,* order dated 05.09.2014, has held that the allotment of new flat was in continuation of the old flat and the date of acquisition of flat sold thus should be considered before the date on which original flat was allotted. We thus see that the action of the assessee is supported by the decision of the Co-ordinate Bench. Be that as it may, in the instant case, the builder / developer had confirmed the

change in the flat number way back on 29.03.2008 and if that date is taken into account as the date of acquisition, the capital gains/losses would be bracketed as Long Term Capital Gains/Losses as per the provisions of the Act. We thus see merit in the plea of the assessee for reversal of the action of the CIT(A) and Assessing Officer. Hence, the position taken by the assessee is restored and the action of the Revenue Authority is set aside.

12. In the result, the appeal of the assessee is allowed.

Order pronounced in the open Court on 20/09/2023

Sd/-	**Sd/-**
[ANUBHAV SHARMA]	**[PRADIP KUMAR KEDIA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

DATED: **/09/2023**

Prabhat