

आयकर अपीलीय अधिकरण "C" न्यायपीठ मुंबई में।

**IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI
BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER
AND SHRI PAWAN SINGH, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A. No. 1306/Mum/2014

(निर्धारण वर्ष / Assessment Year : 2010-11)

Asst. Commissioner of Income Tax, 29 th floor, Centre -1, World Trade Centre, Cuffe Parade, Mumbai – 400005.	बनाम/ v.	M/s Powerica Ltd., 9 th floor, Bakhtawar, Nariman Point, Mumbai – 400021.
स्थायी लेखा सं./PAN :		
AAACP3812E		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

प्रत्याक्षेप सं./C.O. No. 105/Mum/2015

Arising out of ITA No. 1306/Mum/2014

M/s Powerica Ltd., 9 th floor, Bakhtawar, Nariman Point, Mumbai – 400021.	बनाम/ v.	Asst. Commissioner of Income Tax, 29 th floor, Centre -1, World Trade Centre, Cuffe Parade, Mumbai – 400005.
स्थायी लेखा सं./PAN : AAACP3812E		
Cross Objector	..	(प्रत्यर्थी / Respondent)

Revenue by :	Shri C.W. Angolkar
Assessee by :	Shri Vijay Mehta & Shri Nilesh Parekh

सुनवाई की तारीख /**Date of Hearing** : 02-11-2016

घोषणा की तारीख /**Date of Pronouncement** : 30-11-2016

आदेश / O R D E R

PER B.R. BASKARAN, A.M

This appeal of the revenue and the cross objection filed by the assessee are directed against the order dated 04-11-2013 passed by Ld CIT(A)-24, Mumbai and they relate to the assessment year 2010-11. Both the parties are aggrieved by the decision rendered by Ld CIT(A) on the issue of disallowance made u/s 14A of the Act.

2. The cross objection filed by the assessee is barred by limitation by 34 days. The assessee has filed a petition praying the bench to condone the delay. We heard the parties on this preliminary issue. Having regard to the submissions made in the petition, we condone the delay and admit the CO filed by the assessee.

3. The assessee is engaged in the business of manufacture of diesel generating sets & components and also undertakes service works relating to the same. In the original return of income, the assessee computed disallowance u/s 14A of the Act at Rs.40,12,058/-. Subsequently the assessee filed a revised return of income, wherein the disallowance u/s 14A was made at Rs.1,69,15,087/-. The AO noticed that the auditors have certified the direct expenses as Rs.40,12,058/- in the Tax audit report, but the assessee has taken the direct expenses at Rs.3,65,504/- in the revised computation while computing the disallowance at Rs.1,69,15,087/-. Accordingly he increased the direct expenses to Rs.40,12,058/- and enhanced the disallowance to Rs.2,05,61,641/-.

4. The assessee had computed the disallowance u/s 14A to be made for computing book profit u/s 115JB of the Act at Rs.1,48,55,299/-, since the tax is payable on the Long term capital gains under the provisions of sec. 115JB, i.e., the long term capital gain is exempt under normal provisions of the Act, but tax is payable thereon under sec. 115JB of the Act. Hence the assessee reduced the disallowance u/s 14A proportionate to the long term capital gain to the total exempt income. Accordingly the assessee added a sum of Rs.1,48,55,299/- only to the book profit. The AO, however, took the view that the entire amount of Rs.2,05,61,641/- is required to be added to the total income and accordingly added the difference of Rs.57,06,342/- to the book profit.

5. The Ld CIT(A) upheld the disallowance of Rs.2,05,61,641/- made by the AO under normal provisions of the Act. With regard to the addition to be made for computing book profit, the Ld CIT(A), in principle, agreed with the assessee for reduction of disallowance attributable to Long term capital gain. However, he noticed that the assessee had excluded the portion attributable to Long term capital gain from the amount of Rs.1,69,15,087/-. Since the Ld CIT(A) had confirmed disallowance of Rs.2,05,61,641/-, he computed the amount attributable to Long term capital gain at Rs.25,02,327/- and accordingly directed the AO to add only Rs.1,80,59,114/- (2,05,61,641 less 25,02,327/-) for computing book profit u/s 115JB of the Act.

6. The revenue is aggrieved by the direction given by the Ld CIT(A) to the AO to reduce the amount to be added u/s 14A for computing book profit u/s 115JB of the Act by Rs.25,02,327/-. The assessee is aggrieved by the decision of Ld CIT(A) in confirming the disallowance of Rs.2,05,61,641/- under normal provisions of the Act and corresponding increase in the disallowance while

computing the book profit u/s 115JB of the Act. The assessee has also taken an additional ground that the disallowance of Rs.1,69,15,087/- made by the assessee in the revised computation of income itself is against the law and hence the same should also be revised.

7. The Ld A.R submitted that the assessee as well as the revenue has taken the opening and closing value of investments at Rs.33177/- lacs and Rs.33020/- lakhs respectively. Adverting our attention to page 21 of the paper book, which contains "Schedule of Investments", the Ld A.R submitted that the list of investments includes following items:-

- (a) Investments made in subsidiary companies
- (b) Investments made in bonds and debentures. The income realised there from is taxable.
- (c) Investments made in "Growth" schemes of Mutual funds and the assessee will not receive any dividend there from.

The Ld A.R further submitted that the above said investments should be excluded for the purpose of computing disallowance u/s 14A of the Act. He further submitted that the assessee has brought forward most of the investments from the earlier years. Inviting our attention to page 24 of the paper book, the Ld A.R submitted that the assessee has carried out transactions in Mutual fund only during the year under consideration by selling part of investments purchased in the earlier years. Accordingly he submitted that the assessee as well as the revenue has committed a mistake in computing the disallowance without considering the above said factual aspects available in the books of accounts.

8. The Ld A.R submitted that the assessee is entitled to raise new claims, which are admissible under the law, before the Tribunal even if it has been

admitted in the return of income. He submitted that there is no estoppel against the law. Accordingly he submitted that the assessee is entitled to put forth new claims before the Tribunal. In this regard, he placed reliance on the decision rendered by the jurisdictional High Court in the case of CIT Vs. Pruthvi Brokers and Shareholders P Ltd (2012)(349 ITR 336)(Bom).

9. The Ld A.R also submitted that the tax effect involved in the revenue's appeal is less than Rs.10.00 lakhs and hence the same is liable to be dismissed. He submitted that the C.O filed by the assessee is required to be adjudicated separately, even if the revenue's appeal is dismissed. In this regard, he placed reliance on the decision rendered by Hon'ble Kerala High Court in the case of City Centre Builders & Developers (WP(c) No.7668 of 2016(G) dated 02-06-2016), wherein it was held that a Cross objection has to be treated as an independent appeal and has to be decided irrespective of the fact as to whether the appeal filed by the department has been dismissed on whatever grounds.

10. The Ld D.R fairly admitted that the tax effect involved in the appeal of the revenue is less than Rs.10.00 lacs. With regard to the cross objection filed by the assessee, the Ld D.R submitted that the assessee has voluntarily disallowed a sum of Rs.1.69 crores u/s 14A of the Act in the revised return of income and hence the assessee cannot plead for reduction of the same.

11. We have heard rival contentions and perused the record. We have noticed earlier that the investments held by the assessee included investments made in the subsidiaries, bonds, debentures, growth scheme of mutual funds. The interest from bonds and debentures are not exempt and the growth

schemes of mutual funds do not yield any dividend. The investments made in subsidiary companies, according to the assessee, are strategic investments. Further the assessee has submitted (page 24 of paper book) that it has carried out few transactions during the year under consideration only in the mutual funds by way of withdrawing money from the brought forward balance. Accordingly it was submitted that the provisions of Rule 8D should not have been mechanically applied under the facts of the present case. We find merit in the above said submissions of the assessee. The Ld A.R also submitted that the assessee is entitled to put forth new claims and in that regard he has placed reliance on the decision rendered by Hon'ble Bombay High Court in the case of Pruthvi Brokers and Shareholders P Ltd (supra). The Ld A.R also submitted that there is no estoppel against the law and hence the assessee could plead for rectification of disallowance wrongly made by the assessee. We agree with the said contentions of the assessee also. The purpose of assessment is to determine the correct total income of the assessee. Hence wrong application of provisions of the Act needs to be corrected in order to arrive at the correct total income.

12. We have noticed that certain vital facts concerning the investments have not been properly dealt with both by the assessee as well as the tax authorities. Hence, we are of the view that the issue relating to disallowance u/s 14A of the Act requires fresh examination at the end of the AO. Accordingly we set aside the order passed by Ld CIT(A) on this issue and restore the same to the file of the AO for examining the same afresh.

13. The revenue is aggrieved by the decision of Ld CIT(A) in holding that the disallowance attributable to Long term capital gain is required to be excluded

for making addition to the Net profit for the purposes of computing Book Profit u/s 115JB of the Act. Even though the revenue's appeal is required to be dismissed on the ground of tax effect involved therein, we prefer to adjudicate the same on merit, since the same is connected with the issue urged by the assessee. A perusal of the provisions of sec. 10(38) would show that the proviso to sec. 10(38) states that the income by way of long term capital gain of a company shall be taken into account in computing the book profit and income tax payable under section 115JB. The relevant provision of sec. 115JB (clause f of Explanation 1) reads as under:-

“(f) the amount or amounts of expenditure relatable to any income to which section 10 (other than the provisions contained in clause (38) therefore) or section 11 or section 12 apply;”

So for the purpose of computing the amount of expenditure relatable to any income to which section 10 apply, the provisions of sec. 10(38) relating to Long term capital gains are required to be excluded. Accordingly we are of the view that the Ld CIT(A) was justified in downsizing the amount of disallowance, by excluding the disallowance attributable to Long term capital gains, to be added to the Net profit for computing book profit u/s 115JB of the Act, i.e., his action, in our view, is in accordance with the law.

14. However, since we have restored the matter of disallowance u/s 14A of the Act to the file of the AO, the amount of disallowance to be added to Net profit u/s 115JB of the Act may undergo a change. Accordingly, while approving the principle followed by the Ld CIT(A), we are of the view that the quantum of disallowance to be added to Net profit needs to be set aside to the file of the AO. Accordingly we restore this issue to the file of the AO.

15. In the result, the appeal filed by the revenue is treated as partly allowed and the cross objection of the assessee is treated as allowed.

Order pronounced in the open court on 30th November, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 30-11-2016 को की गई ।

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

sd/-
(B.R. BASKARAN)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 30-11-2016

व.नि.स./ R.K., Ex. Sr. 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)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "C" Bench
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai