

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "E", MUMBAI**

**BEFORE SHRI R.C. SHARMA, ACCOUNTANT MEMBER AND
SHRI SANJAY GARG, JUDICIAL MEMBER**

**ITA No.7710/M/2011
Assessment Year: 2008-09**

Tikuchand D. Jogani, 301, Gundecha Chambers, N.M. Road, Fort, Mumbai – 400 023 PAN: AAAPJ8019Q	Vs.	DCIT – 12(3), R.No.121, Aayakar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Ashok J. Patil, A.R.
Revenue by : Shri Neil Philip, D.R.

Date of Hearing : 09.07.2015
Date of Pronouncement : 30.10.2015

ORDER

Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the assessee against the order dated 19.09.2011 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2008-09.

2. The assessee has taken the following grounds of appeal:

“(1) The learned Commissioner of Income (Appeal) erred in treating an amount Loss of Rs.4,74,810/- under the head 'Income from Business or Profession' instead of Loss from Short Term Capital Gains' disclosed by the appellant and while doing so he amongst others failed to appreciate that:

- (a) The Loss arising on transfer of the capital assets held by the appellant by way of shares was on account of the investments held by the appellant;
- (b) The Loss disclosed by the appellant under the head 'Short Term Capital Gains/Loss' was on account of the shares purchased with making an investment;
- (c) The appellant had maintained separate books for the investments

- made and the business activities carried on of trading in shares.
- (d) As in the earlier years, the appellant continued to be an investor in shares.
 - (e) The appellant was not a trader vis-a-vis the shares, which have yielded income/Loss under the head 'Short Term Capital Gains/Loss', as disclosed in the return of income filed.

(2) The learned Commissioner of Income (Appeal) Tax erred in disallowing Rs.2492,047/u/s 14A of the Income Tax Act as expenditure incurred in relation to earning of exempt income and in computing the disallowance u/r 8D(2) of Income Tax Rules.

(3) The learned Commissioner of Income (Appeal) Tax erred in disallowing interest expenses of Rs. 11,89,256/- on interest free loan given

(4) The learned Commissioner of Income (Appeal) erred in charging interest u/s 234A, 234B, 234C and 234D and having regard to the facts and circumstances of the case and in law the appellant denied its liability for payment of any interest under the aforesaid sections.

(5) The learned Commissioner of Income (Appeal) erred in initiating penalty proceedings u/s 271(1)(c) in spite of the fact that the appellant had neither concealed his income nor had filed inaccurate particulars of income.”

3. A perusal of the ground No.1 of the appeal reveals that the sole issue raised in the ground of appeal is as to whether the amount of loss of Rs.4,74,810/- is to be treated as short term capital loss as claimed by the assessee or as business loss as treated by the lower authorities. The Assessing Officer (hereinafter referred to as the AO) during the assessment proceedings noted that the assessee was regularly entering into the share transactions and that the frequency of the transactions was very high. He therefore held that the activity of the assessee was not of an investor but of a trader. He, accordingly, treated the loss on share transactions as business loss of the assessee. Being aggrieved, the assessee preferred appeal before the Ld. CIT(A).

4. The Ld. CIT(A) also noted that the assessee was indulged in purchase and sale of shares on large scale. He further noted that in the identical facts and circumstances for the earlier assessment year i.e. A.Y. 2006-07, it was held

that the assessee indulged in the share transactions on a regular basis and on a substantially high scale. He further observed that for the year under consideration, the share transaction pattern of the assessee was almost identical and that in similar facts and circumstances, the income of the assessee from share transactions was held as business income.

5. At the outset, the Ld. A.R. of the assessee has brought our attention to the decision of the Tribunal in the own case of the assessee for A.Y. 2006-07 vide ITA No.2285/M/2010 decided on 21.08.13 wherein the finding of the Ld. CIT(A) for A.Y. 2006-07 has been reversed by the Tribunal. We note from the said order dated 21.08.13 (supra) that in the earlier assessment year, the assessee had shown short term capital gains of Rs.1,21,42,192/-. The Tribunal after considering the overall facts and circumstances of the case held that the income earned by the assessee from share transactions has to be treated as capital gains and not business income of the assessee. In the year under consideration before us, the assessee has not earned positive income out of share transaction activity but has returned short term capital loss of Rs.4,74,810/-. The Ld. CIT(A) has, based on the findings of the decision for the earlier assessment year being on identical facts, held that the short term capital loss for this year was to be treated as business loss. However, since the findings of the Ld. CIT(A) for A.Y. 2006-07 have been reversed by the Tribunal by order dated 21.08.13 and it is also an admitted fact that the investment pattern/ share transaction activity is almost identical to that of the earlier assessment year, hence, applying the same ratio and for the sake of principle of consistency, we hold that the short term capital loss returned by the assessee has to be treated as such and not as business income of the assessee. This issue is accordingly decided in favour of the assessee.

6. Vide Ground No.2, the assessee has agitated the disallowance of Rs.24,92,047/- under section 14A of the Act in relation to the expenditure incurred for earning of exempt income. The AO found that the assessee had earned exempt dividend income. The assessee had incurred interest and other expenses for earning of such dividend income. He, therefore, computed the disallowance under section 14A read with rule 8D at Rs.24,92,047/- and added back the same into the income of the assessee.

During the appellate proceedings before the Ld. CIT(A), the assessee submitted that the AO had not given an exact finding of incurring of expenditure for earning of tax exempt income but had straightway applied rule 8D of the Income Tax Rules. The Ld. CIT(A), however, did not agree with the contention of the assessee and held that the rule 8D was applicable for A.Y. 2008-09 onwards in the light of the decision of the Hon'ble Bombay High Court in the case of "Godrej & Boyce Manufacturing Co. Ltd. Vs. DCIT [(2010) 328 ITR 81 (Bom)]". He, therefore, upheld the disallowance so made by the AO. Being aggrieved, the assessee has come in appeal before us.

7. We have heard the rival contentions. It may be observed that in the case of '**Godrej & Boyce Manufacturing Co. Ltd.**' **328 ITR 81**, the Hon'ble Bombay High Court has held that Rule 8D r.w.s. 14A(2) is not arbitrary or unreasonable and also not retrospective and applies from A.Y. 2008-09. It has been further held that under section 14A of the Income Tax Act, resort can be made to Rule 8D of the Income Tax Rules for determining the amount of expenditure in relation to exempt income, if, the AO is not satisfied with the correctness of the claim made by the assessee in respect of such expenditure. The satisfaction of the Assessing Officer has to be arrived at, having regard to the accounts of the assessee. Sub section (2) does not ipso facto enable the Assessing Officer to apply the method prescribed by the rules straightaway

without considering whether the claim made by the assessee in respect such expenditure is correct. The satisfaction of the Assessing Officer must be arrived at on an objective basis. In a situation where the accounts of the assessee furnish an objective basis for the Assessing Officer to arrive at a satisfaction in regard to the correctness of the claim of the assessee, there would be no warrant for taking recourse to the method prescribed by the rules. An objective satisfaction contemplates a notice to the assessee, an opportunity to the assessee to place on record all the relevant facts including his accounts and recording of reasons by the Assessing Officer in the event that he comes to the conclusion that he is not satisfied with the claim of the assessee.

8. However, a perusal of the assessment order reveals that the AO has not followed the guidelines of objective satisfaction as laid down by the Hon'ble Bombay high Court in the case of Godrej & Boyce (supra) while making the disallowance . He without recording any reasoning for his dissatisfaction with regard to the working/claim of the assessee, straightway applied Rule 8D against the mandate of the provisions of section 14A of the Income Tax Act. The Id. CIT(A) also ignored the mandate of the provisions of section 14 A, while confirming the disallowance.

9. So keeping in view of the overall facts and circumstances of the case, we restore this issue back to the file of the AO with a direction that the AO will give opportunity to the assessee to place on record all the relevant facts including its accounts and then examine the computation/calculation made in this regard by the assessee having regard to the accounts of the assessee. The AO will be at liberty to call for any record/evidences or statement etc. from the assessee as may be required by him for deciding the issue under consideration. After going through the details provided by the assessee, the AO will decide the issue by way of a speaking order in the light of the observations made

above. Needless to say, the assessee will co-operate and promptly supply the necessary details etc. to the AO for deciding the issue under consideration. We accordingly restore the matter to the file of the AO to decide this issue afresh in accordance with law.

10. The assessee, vide ground No.3, has contested the disallowance of interest expenditure of Rs.11,89,256/- on interest free loan given. The Ld. A.R. of the assessee submitted before the lower authorities that the interest free loan was advanced out of own funds of the assessee, hence, the interest disallowance was not attracted. Reliance was placed in this respect in the case of “CIT vs. Reliance Utilities and Power Ltd.” (2009) 313 ITR 340 (Bom).

It has also been stated by the Id. AR that the AO, while computing the interest disallowance, has made double disallowance as that the same amount has been considered twice for interest disallowance.

11. We have considered the rival contentions made by the parties. It may be observed that the Hon’ble Bombay High Court in the case of “CIT vs. Reliance Utilities and Power Ltd” (supra) has held that if there are funds available, both interest free and over draft and/or loans taken, then a presumption would arise that investments would be out of the interest free fund generated or available with the company, if the interest free funds were sufficient to meet the investment. Similar proposition can be applied in the case of assessee also. If the assessee is able to prove that sufficient own funds were available with the assessee then it has to be presumed that interest free loans were advanced by the assessee out of his own funds. However this is required to be demonstrated from his accounts by the assessee before the AO. Further the assessee has claimed that it is a case of double disallowance. We accordingly restore the matter to the file of the AO to decide this issue afresh and also to verify as to

whether any double disallowance has been made on this issue and to decide the issue in accordance with law.

12. Vide ground No.4, the assessee has contested the charging of interest under section 234A, 234B, 234C and 234D. This ground being consequential in nature does not require any finding at this stage.

13. Ground No.5 is relating to initiation of penalty proceedings under section 271(1)(c) of the Act. This ground is premature and does not require any adjudication at this stage.

14. In the result, the appeal of the assessee is treated as allowed for statistical purposes.

Order pronounced in the open court on 30.10.2015.

Sd/-
(R.C. Sharma)
ACCOUNTANT MEMBER

Sd/-
(Sanjay Garg)
JUDICIAL MEMBER

Mumbai, Dated: 30.10.2015.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.