

आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ 'बी', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH MUMBAI

**BEFORE SHRI R.C.SHARMA, AM
&
SHRI MAHAVIR SINGH, JM**

आयकर अपील सं./ITA Nos.6811 & 6812/Mum/2012
ITA No.1354/Mum/2010 & ITA Nos.1560&1561/Mum/2007
(निर्धारण वर्ष / Assessment Years : 2007-08, 2008-09, 2005-06,
2002-03 & 2003-04)

Metmin Finance and Holdings Private Limited, 161/162, Mittal Court, 'A' Wing, Nariman Point, Mumbai-400021	Vs.	DCIT-3(2), Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACM 4026 D		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

AND

आयकर अपील सं./ITA Nos.6813 & 6814/Mum/2012
(निर्धारण वर्ष / Assessment Years : 2007-08 & 2008-09)

Metmin Investment and Trading Private Limited, 161/162, Mittal Court, 'A' Wing, Nariman Point, Mumbai-400021	Vs.	DCIT-3(2), Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACM 2480 P		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

निर्धारिती की ओर से /Assessee by : Shri Haresh G. Buch
राजस्व की ओर से /Revenue by : Dr. Sandeep Goel
सुनवाई की तारीख / Date of Hearing : **22/03/2016**
घोषणा की तारीख/Date of Pronouncement **30/03/2016**

आदेश / O R D E R

PER R.C.SHARMA (A.M):

Metmin Finance and Holdings Private Limited

These are the appeals filed by the assessee against the order of CIT(A), Mumbai, for the assessment years 2007-08, 2008-09, 2005-

06, 2002-03 & 2003-04, in the matter of order passed u/s.143(3) of the I.T.Act.

2. At the outset, Id. AR did not press the appeals filed in ITA No.1560&1561/M/07 (AY:2002-03 & 2003-04) and ITA No.6811/M/12 (AY 2008-09). As these appeals were not pressed, the same are dismissed in limine.

3. Common grievance of assessee in assessment years 2005-06, 2007-08 pertains to disallowance u/s.14A of the I.T.Act.

4. We have considered rival contentions and found that the AO has disallowed assessee's claim by relying on the decision of Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. Ltd. 328 ITR 81 and applied rule 8D. By the impugned order, the CIT(A) confirmed the action of AO on the plea that even though rule 8D is not applicable but reasonable disallowance is warranted. Accordingly, he confirmed the action of AO.

5. Ld. AR placed on record following decision of the Tribunal, wherein prior to the assessment year 2008-09, disallowance u/s.14A was restricted 1% to 5% on exempt dividend income :-

CIT v. Godrej Agrovat Ltd. (ITA No. 934 of 2011) (Bom HC)
M/s Godrej Agrovat Ltd. v. ACIT (ITA No. 1629/Mum/2009) (Mum)
DCIT v. Monsanto India Ltd. (ITA No. 6670/Mum/2012) (Mum)
Mahanagar Gas Ltd. v. DCIT (ITA No. 958/Mum/2011) (Mum)
M/s Quest Investment Advisors Pvt. Ltd. v. ACIT (ITA No. 5685/Mum/2010)
M/s. Syngenta India Limited v. JCIT (ITA No. 2977/Mum/2006)

6. Ld. AR further contended that investment held as stock in trade are not to be considered for the purpose of calculating average investment in view of the following judicial pronouncements :-

M/s. CCI Ltd. v. JCIT (ITA No. 359 of 2011) (Karnataka HC)
DCIT v. India Advantage Securities Ltd. (ITA No. 1131 of 2013) (Bom HC)
DCIT v. M/s. India Advantage Securities Ltd. (ITA No. 671/Mum/2011) (Mum)
DCIT v. Baljit Securities (P.) Ltd. (68 SOT 82)
M/s. JMP Securities Pvt. Ltd. v. ACIT (ITA No. 5688/Mum/2013) (Mum)
DCIT v. Shree Durga Capital Ltd. (ITA No. 7405/Mm/2011) (Mum)
Devkant Synthetics (India) Pvt. Ltd. v. ITA (ITA No. 2663, 2664 and 2665/Mum/2015) (Mum)
D.H. Securities Pvt. Ltd. v. DCIT (ITA No. 5724/Mum/2011) (Mum)

7. We have considered rival contentions, carefully gone through the orders of the authorities below and also deliberated on the judicial pronouncements cited by Id. AR in the factual matrix of the instant case. After considering the nature of exempt income received by the assessee vis-à-vis nature of investment so made and the expenditure so incurred, we direct the AO to restrict disallowance to the extent of 5% of the exempt dividend income so received by the assessee following the proposition of law laid down by the judicial pronouncements referred above.

8. We have also found that assessee was holding shares not only as investment but also as stock in trade. In view of the decisions referred by Id. AR such stock in trade are not to be considered for computing average investment while making disallowance under rule 8D. Respectfully following the proposition of law laid down in these judgments, we direct the AO to exclude shares held by assessee as stock in trade for the

purpose of calculating average investments while working out disallowance under rule 8D. We direct accordingly.

9. In the assessment years 2007-08 & 2008-09, the assessee is also aggrieved for not allowing set off of unabsorbed depreciation against income from other sources.

10. Ld. AR relied on the decision of Hon'ble Orissa High Court in the case of R.N.Mishra, 215 ITR 694 in support of the proposition that brought forward depreciation is different from speculation loss, therefore, while computing total income same should be allowed to be set off against income from other sources.

11. We have considered rival contentions and found that the AO has disallowed assessee's claim of set off of current year's unabsorbed depreciation against income from other sources. By the impugned order, the CIT(A) has upheld AO's stand by observing that assessee has business loss which is assessed as speculation loss which includes depreciation also, therefore, depreciation is part of such speculation loss which is not separately allowable to be set off against any other income.

12. We have considered rival contentions and found that assessee's claim to set off of unabsorbed depreciation was declined on the plea that depreciation was part of speculation loss. In the instant case before us, the assessee was dealing in shares, by invoking Explanation to Section 73 the AO has treated the loss incurred in purchase and sale of shares as speculative in nature. Accordingly depreciation was not allowed to be set

off against income from other sources. The Hon'ble Orissa High Court in the case of R.N.Mishra (supra) has observed that depreciation has been treated differently by the legislature from business loss and loss in speculation business, rigour of limitation is not applicable in the case of unabsorbed depreciation allowance. Hon'ble Gauhati High Court in the case of Singh Transport Co., 123 ITR 698 observed as under :-

The provision of section 32(2) is an independent provision providing the manner of set off and carry forward of depreciation allowance. Therefore, unabsorbed depreciation allowance never loses its nature or character as depreciation allowance. Unabsorbed depreciation allowance goes by virtue of the provisions of section 32(2) itself. In our opinion, section 32(2) of the Act is a complete code dealing with set-off and carry forward of depreciation allowance. Depreciation allowance never loses its character, nature of colour as unabsorbed depreciation allowance and is always required to be set off and carried forward not by force of s.72 and/or s.73 but by virtue of the provisions of s.32(2) itself. Applicability of ss.72(2) and 73(3) is exclusively for the purpose of giving priority inter se between losses and depreciation allowance."

In view of the above discussion, we restore the matter back to the file of AO with a direction to decide the issue afresh in the light of above judicial pronouncements.

Metmin Investment and Trading Private Limited
(ITA Nos.6813&6814/M/12)

13. In the assessment year 2007-08, the assessee is aggrieved for disallowance u/s.14A and decline of set off of unabsorbed depreciation against income from other sources. Following the reasoning given by us hereinabove in para 12, we direct the AO to decide the issue as per the direction given by the Tribunal hereinabove.

14. The appeal for assessment year 2008-09 was not pressed by Id. AR, the same is, therefore, dismissed in *limine*.

15. In the result, appeals i.e. ITA Nos.1560&1561/M/07 and 6811&6814/M/12 are dismissed, whereas appeals i.e. ITA Nos.6812&6813/M/12 and ITA No.1354/M/10 are allowed in part in terms indicated hereinabove.

Order pronounced in the open court on this 30/03/2016.

Sd/-

(MAHAVIR SINGH)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-

(R.C.SHARMA)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 30/03/2016

प्र.कु.मि/pkm, नि.स/ PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A), Mumbai.
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//

उप/सहायक पंजीकार

(Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai