आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND
SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER

आयकर अपील स / ITA No.2464/PUN/2016
निर्धारण वर्ष / Assessment Year : 2010-11

Santosh Mohanlal Rathi,
Flat No. 8 & 9,
Tulsi Apartment,
Rasta Peth,
Pune – 411011

PAN : ADBPR7665N

.....अपीलार्थी / Appellant

बनाम / V/s.

Dy. CIT, Circle-2, Pune

.....प्रत्यर्थी / Respondent

Assessee by : Shri Prateek Jha
Revenue by : Shri S.P. Walimbe

सुनवाई की तारीख / Date of Hearing : 05-11-2020
घोषणा की तारीख / Date of Pronouncement : 09-12-2020

आदेश / ORDER

PER S.S. VISWANETHRA RAVI, JM :

This appeal by the assessee against the order dated 29-07-2016 passed by the Commissioner of Income Tax (Appeals)-2, Pune ['CIT(A)'] for assessment year 2010-11.

2. Ground No. 1 raised by the assessee challenging the action of CIT(A) in upholding the profit on sale of shares is business income as against the claim of income from Capital Gains.

3. The brief facts relating to the issue on hand are that the assessee is an individual and engaged in share trading and a sub-broker of M/s. Emkay Shares & Stock Brokers Ltd., Mumbai. The assessee declared a capital gain of Rs.90,47,345/-. The quantum of sale and purchase along with the transaction value of the various scrips is reproduced below :

S. No.	Name of the scrip	Period	Quantity bought	Amount Rs.	Quantity sold	Amount Rs.	Profit
1	Kerala Chem	1.4.09 to 31.3.10	1,95,586	2,66,71,998	1,77,582	2,89,13,458	83,24,062
2	Educom	-do-	530	18,25,801	800	24,68,562	6,42,761
3	Hercules	-do-	36,930	63,91,595	43,428	73,57,070	3,66,303
4	Others	-do-	57,612	1,20,51,392	61,247	1,02,17,386	27,619

4. According to AO from the above chart, the assessee regularly engaged in purchase and sale of shares with a motive of earning a profit. The profit made is high involving an element of uncertainty. Further, the assessee utilized borrowed funds for trading of shares and he show caused the assessee why above said amount on account of profit should not be treated as business income. The assessee made his contentions vide letter dated 01-03-2013 which is on record by the AO in his order from pages 2 to 4. The AO considered the written submissions of assessee and discussed the same in paras 3.4 to 3.8 and held that the intention of assessee in buying the shares is not to derive income by way of dividend but to earn profits on sale of shares and added above said amount to the total income of the assessee holding that it is income from business.

5. Before CIT(A) in First Appellate proceedings, the assessee contended that the AO erred in treating the gains on sale of shares held as investment as business profit without appreciating the intention of assessee in making investment. Further, it was argued that the AO failed to appreciate the primary objective of assessee to hold certain shares. The income from dividend is normally low on investment and the assessee shown the income as capital gain on the shares held under the head investment. The CIT(A) did not agree with the arguments advanced in the First Appellate proceedings. He placed reliance in the case of Jaijuria Bros Ltd. Vs. CIT reported in 180 ITR 208 of Hon'ble Calcutta High Court and held the shares which have been held for short duration and have been frequently transacted is assessable under the head income from business. Further, he placed reliance in the case of Majoj Kumar Samdaria Vs. CIT reported in 223 Taxman 245 of Hon'ble High Court of Delhi and held income arising from sales of shares of very high frequency and volume and is assessable as business income. Thereby, he upheld the order of AO in treating an amount of Rs.90,47,345/- as income from business.

6. Before us, Shri Prateek Jha, the ld. AR submits that the shares sold during the previous year relevant to year under consideration were purchased during the earlier years as well as in current year. The assessee maintained separate portfolios for investment and trading and referred to computation of total income at page 11 of paper book (Vol.-I). The short term capital gains on sale of shares are from the investment portfolios and income earned from under investment portfolios is to be assessed as income from capital gain and referred to page 14 of the paper book. The intention of assessee is clear to hold the shares as investment and held the same as in investment portfolio. The shares purchased in the investment

portfolio are only those shares are on delivery based transaction. The investment and capital loss on delivery based transaction were held as on account of short term capital gain income or short term capital loss and referred to page 18 of the paper book. The major portion of gain pertains to transactions related to sale of shares of Nitta Gelatine and referred to page 52 of the paper book. The sale and purchase of Nitta Gelatine were held on an average for more than six months and the period of holding of such shares are significant which indicates the intention of assessee for investment and referred to pages 68 and 69 of the paper book. The assessee received dividend income for the year under consideration and for A.Y. 2009-10 shown the said shares in investment portfolio. The assessee also valued the stock of shares on the basis of average cost of the respective shares in investment portfolio. The assessee following the same declared the profit earned on shares in investment portfolio for A.Ys. 2008-09 and 2009-10 as capital gain and the respondent-revenue accepted the same under scrutiny proceedings u/s. 143(3) of the Act. The ld. AR placed reliance on the decision of Hon'ble High Court of Bombay in the case of CIT Vs. Gopal Purohit reported in 336 ITR 287 and prayed to allow ground No. 1 raised by the assessee.

7. The ld. DR, Shri S.P. Walimbe submits that the treatment in the books of assessee is not conclusive, if the volume, frequency and regularity with which the transactions are carried out indicate systematic and organized activity with a profit motive, then, it becomes business profit and not capital gain. The assessee does not have a separate portfolio of shares held as investment and as stock-in-trade. The total volume of the transactions on account of purchase of shares was Rs.4.69 crores and the total volume of transactions on account of sale of shares was Rs.4.89

crores. He argued that the percentage of purchase and sale is 95% and the transaction of purchase and sale of shares is evenly spread over the entire year. He argued that it is clear the activity of the assessee is organized and systematic with a profit motive and such activities of the assessee partake the characteristics of business, and it cannot be held the assessee has merely made investments in shares. The assessee has substantial unsecured loans and also paid interest on such loans. The assessee utilized said loans for the purpose of trading of shares. He argued that the intention of assessee is clear in buying the shares is to earn profits. He submitted that the CIT(A) has rightly placed reliance in the case of Manoj Kumar Samdaria (supra) wherein the SLP filed against the said decision, the Hon'ble Supreme Court dismissed the said SLP which is reported in 228 Taxman 63 (SC). He argued that the profit on transaction in shares is to be treated as business income in terms of decision of Hon'ble Supreme Court in the case of Majoj Kumar Samdaria (supra) and prayed to dismiss the ground No. 1 raised by the assessee.

8. Heard both sides and perused the material available on the record. The AO held the assessee did not maintain two portfolios for investment and trading. But, however, at Page No.14 of the paper book which clearly shows the assessee has maintained two portfolios, one for investment and the other is for trading. Further, we note that at page No.11 of the paper book, the assessee computed the sale of shares as business income from trading portfolio and capital gain from investment portfolio. Therefore, in our opinion, the observations of both the authorities i.e., AO and ld.CIT(A) are incorrect to the extent that assessee does not have two portfolios. There is no dispute that all the shares which were sold are delivery based transactions. We find from Page No.18 of the paper book that the

assessee has shown the gains from selling of shares as capital gain and the loss has been shown as capital loss. The subjected shares which were in dispute before us are related to the sale of shares of Nitta Gelatine which is clear from page No.52 of the paper book. All those shares, we find were held for more than six months which were purchased during earlier year i.e., A.Y. 2009-10 and current year reflected in Page Nos.69 and 78 of the Paper Book. We note that the respondent Revenue accepted the treatment of gains arising from sale of shares as capital gains in earlier assessment years 2008-09 and 2009-10 and there is no dispute by the ld. D.R. before us regarding the same. Following the same treatment, the assessee assessed the gains from the investment portfolio as income from capital gains in the year under consideration.

9. Coming to the Hon'ble Jurisdictional High Court of Bombay in the case of Gopal Rohit reported in 336 ITR 287 was pleased to uphold the order of Tribunal in holding the delivery based transactions are in the nature of investments and profit received thereon should be assessed as capital gains. We note that the respondent Revenue raised three substantial questions of law before the Hon'ble High Court of Bombay : (i) the Tribunal erred in treating the profits arising from sale of shares from investment portfolio as capital gains, (ii) not justified in holding the principle of consistency and (iii) not justified in treating the entries in books of accounts as crucial. The Hon'ble High Court of Bombay was pleased to uphold the order of Tribunal and dismissed the above said three substantial questions of law raised by the respondent Revenue. In the present case, there is no dispute that all the shares are delivery based and same has been shown in the separate investment portfolio. Further, assessee has treated all the delivery based shares in investment portfolio

and made entries to that effect in his books of accounts. Further, the respondent Revenue consistently accepted the treatment of shares and the profits arising thereon as capital gain for A.Ys. 2008-09 and 2009-10. The intention of the assessee is clearly established in treating the same as shares in investment portfolio for the earlier two years and respondent Revenue consistently accepted the said treatment shown by the assessee. Therefore, in our opinion, the order of ld.CIT(A) is liable to be set aside in terms of principle laid down by the Hon'ble Jurisdictional High Court which was upheld by the Hon'ble Supreme Court. For better understanding, the relevant portion of the decision of Hon'ble High Court of Bombay in the case of CIT Vs. Gopal Purohit cited supra is reproduced hereunder :

> *"The following questions of law have been formulated in the appeal filed by the Revenue against the judgment of the Tribunal, dt. 10th Feb., 2009 :*
>
> *"(a) Whether, on the facts and circumstances of the case and in law, the Hon'ble Tribunal was justified in treating the income from sale of 7,59,003 shares for Rs. 5,00,12,879 as an income from short-term capital gain and sale of 3,88,797 shares for Rs. 6,65,02,340 as long-term capital gain as against the "income from business" assessed by the AO ?*
>
> *(b) Whether, on the facts and circumstances of the case and in law, the Hon'ble Tribunal was justified in holding that principle of consistency must be applied here as authorities did not treat the assessee as a share trader in preceding year, in spite of existence of similar transaction, which cannot in any way operate as res judicata to preclude the authorities from holding such transactions as business activities in current year ?*
>
> *(c) Whether, on the facts and circumstances of the case and in law, the Hon'ble Tribunal was justified in holding that presentation in the books of account is the most crucial source of gathering intention of the assessee as regards to the nature of transaction without appreciating that the entries in the books of accounts alone are not conclusive proof to decide the income ?"*
>
> ***2.*** *The Tribunal has entered a pure finding of fact that the assessee was engaged in two different types of transactions. The first set of transactions involved investment in shares. The second set of transactions involved dealing in shares for the purposes of business (described in para 8.3 of the judgment of*

the Tribunal as transactions purely of jobbing without delivery). The Tribunal has correctly applied the principle of law in accepting the position that it is open to an assessee to maintain two separate portfolios, one relating to investment in shares and another relating to business activities involving dealing in shares. The Tribunal held that the delivery based transactions in the present case, should be treated as those in the nature of investment transactions and the profit received therefrom should be treated either as short-term or, as the case may be, long-term capital gain, depending upon the period of the holding. A finding of fact has been arrived at by the Tribunal as regards the existence of two distinct types of transactions namely, those by way of investment on one hand and those for the purposes of business on the other hand. Question (a) above, does not raise any substantial question of law.

3. *Insofar as Question (b) is concerned, the Tribunal has observed in para 8.1 of its judgment that the assessee has followed a consistent practice in regard to the nature of the activities, the manner of keeping records and the presentation of shares as investment at the end of the year, in all the years. The Revenue submitted that a different view should be taken for the year under consideration, since the principle of res judicata is not applicable to assessment proceedings. The Tribunal correctly accepted the position that the principle of res judicata is not attracted since each assessment year is separate in itself. The Tribunal held that there ought to be uniformity in treatment and consistency when the facts and circumstances are identical, particularly in the case of the assessee. This approach of the Tribunal cannot be faulted. The Revenue did not furnish any justification for adopting a divergent approach for the assessment year in question. Question (b), therefore, does not also raise any substantial question.*

4. *Insofar as Question (c) is concerned, again there cannot be any dispute about the basic proposition that entries in the books of account alone are not conclusive in determining the nature of income. The Tribunal has applied the correct principle in arriving at the decision in the facts of the present case. The finding of fact does not call for interference in an appeal under s. 260A. No substantial question of law is raised. The appeal is accordingly dismissed."*

10. We find in the light of the facts and circumstances of the above case before the Hon'ble High Court of Bombay are identical to the facts of the present case and the ratio laid down by the Hon'ble High Court of Bombay (supra) is applicable to the present case. Therefore, the order of ld.CIT(A) is not justified and it is set aside. The ground No.1 of the assessee is allowed.

11. Ground No.2 raised by the assessee challenging the action of ld.CIT(A) in confirming the disallowance under Sec.14A r.w.r 8D in the facts and circumstances of the case.

12. Heard both sides and perused the material available on record. The assessee earned dividend of Rs.2,03,834/- and claimed exemption under the Act. The AO show caused why the provisions under Sec.14A r.w.r. 8D(2)(ii) shall not be applied. It was contended that no expenditure incurred in earning the exempt income and the said shares which yield exempt income were purchased in earlier year and the same were held under the head "Investment" portfolio. We note that the same has been in the Balance-Sheet as on 31.03.2009 during the year under consideration. Before ld.CIT(A) also the same contentions have been raised by the assessee, however the ld.CIT(A) went on to uphold the disallowance made by the AO by applying Rule 8D of I.T. Rules.

13. The contention of Shri Prateek Jha, Ld.A.R. is that the disallowance made for the purpose of Sec.14A of the Act by applying Rule 8D(2) of Income Tax Rules is not maintainable in view of the fact that there was no expenditure incurred on the remaining exempt income. He further contended that the shares have been purchased during the year under consideration and also in earlier years and there cannot be disallowance more than the exempt income. He prayed to delete the addition as confirmed by the ld.CIT(A). We note that assessee earned exempt income of Rs.2,03,834/- and the disallowance made by the AO and confirmed by the ld.CIT(A) is Rs.7,66,911/-. In this regard, we find force in the argument of the Ld.A.R. that there cannot be disallowance more than the exempt income.

14. We also find in the decision of Hon'ble Bombay High Court in the case of M/s. Nirved Traders Pvt. Ltd., Vs. DCIT (ITA No.149/2017 dated 23.04.2019) wherein the Jurisdictional High Court held that the disallowance under Section 14A of the Act read with Rule 8D(2) of the Rules cannot exceed the Assessee's exempt income and the relevant portion of the same is extracted herein below :

> *"5. Having heard the learned Counsel for the parties and having perused the documents on record, consistently different High Courts in the country have taken a view that the disallowance under Section 14A of the Act read with Rule 8D of the Rules cannot exceed the Assessee's exempt income. The Delhi High Court, in the case of Cheminvest Ltd. Vs. Commissioner of Income Tax 1, has held that when the Assessee has not earned any income which was exempt from tax, disallowance of the expenditure under Section 14A read with 8D of the Rules would not be permissible.*
>
> *6. Karnataka High Court, in the case of Pragati Krishna Gramin Bank Vs. Joint Commissioner of Income-tax2, has held that expenditure in relation to income not includable in the total income cannot exceed such income. It was observed as under.*
>
> *"14. We make it clear that the expenditure for earning exempted income has to have a reasonable proportion to the income, so earned, going by the common financial prudence.*
>
> *Therefore, even if the Assessing Authority has to make an estimate of such an expenditure incurred to earn exempted income, it has to have a rational nexus with the amount of income earned itself. Disallowance under Section 14A of Rs.2,48,85,000/- as expenses to earn exempted Dividend income of Rs.1,80,30,965/- is per se absurd and 1 378 ITR 33 2 [2018] 256 Taxman 349 (Karnatama) URS 3 of 7 4 3-ITXA 149-17.odt hypothetical. The disallowance under Section 8D cannot exceed the expenses claimed by assessee under the Proviso to Rule 8D. Therefore, where the assessee claimed that assessee did not incur any such expenditure during the year in question to earn Dividends of Rs.1,80,30,965/-, the burden was upon the assessing authority to compute the interest on such borrowed funds which were dedicatedly used for investment in securities to earn such exempted Dividend income. The disallowance under Section 14A cannot be wild guesswork bereft of ground realities. It has to have a reasonable and close nexus with the factually incurred expenses. It is not deemed disallowance under Section 14A of the act but an enabling provision for assessing authority to compute the same on the given facts and figures in the regularly maintained Books of Accounts. The assessing authority also could not have called upon the Assessee himself to undertake the exercise of computing the disallowance under Section 8D of the Rules. Such abdication of duty is not permissible in law. Since no such exercise has been undertaken by the assessing authority, the case calls for a remand."*

7. Gujarat High Court, in the case of Commissioner of Income-tax-I Vs. Corrtech Energy (P.) Ltd.3, has held and observed as under :

> *"4. Counsel for the Revenue submitted that the Assessing Officer as well as CIT (Appeals) had applied formula of rule 8D of the Income Tax Rules, since this case arose after the assessment year 2009-2010. Since in the present case, we are concerned with the assessment year 2009-2010, such formula was correctly applied by the Revenue. We however, notice that sub-section (1) of section 14A provides that for the purpose of computing total income under chapter IV of 3 [2015] 372 ITR 97 URS 4 of 7 5 3-ITXA 149-17.odt the Act, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under the Act. In the present case, the tribunal has recorded the finding of fact that the assessee did not make any claim for exemption of any income from payment of tax. It was on this basis that the tribunal held that disallowance under section 14A of the Act could not be made. In the process tribunal relied on the decision of Division Bench of Punjab and Haryana High Court in case of CIT v Winsome Textile Industries Ltd. [2009] 319 ITR 204 in which also the Court had observed as under :*

"7. We do not find any merit in this submission. The judgement of this court in Abhishek Industries Ltd. (2006) 286 ITR 1 was on the issue of allowability of interest paid on loans given to sister concerns, without interest. It was held that deduction for interest was permissible when loan was taken for business purpose and not for diverting the same to sister concern without having nexus with the business. The observations made therein have to be read in that context. In the present case, admittedly the assessee did not make any claim for exemption. In such a situation section 14A could have no application."

5. We do not find any question of law arising. Appeal is therefore dismissed."

8. Recently, this Court, in a decision dated 4th February, 2019, in the case of The Pr. Commissioner of Income Tax-10 Vs. HSBC Invest Direct (India) Ltd. had observed as under.

"4. Having heard learned Counsel for the parties and perused documents on record, we notice that in Cheminvest Ltd. (supra) Delhi High Court had referred to and relied upon its earlier decision in the case of CIT Vs. Holcim India (P) Ltd. (I.T.A. No.486 of 2014, decided on 5 th September 2014). we further notice that this Court in Income Tax Appeal No.693 of 2015 by an order dated 21 st November, 2017 while dismissing the Revenue's appeal on similar issue had noted that the decision of Delhi High Court in case of Holcim India)P) Ltd. (supra) had adopted the same principles. In the present case, Counsel for the Revenue however, points out that this is not a case where the assessee had earned no income which was exempt from tax. However, in our opinion, the ratio of the above noted decisions in the cases of Cheminvest Ltd. and Holcim India (P) Ltd. (supra) would include a facet where the assessee's income exempt from tax is not NIL but has earned exempt income which is larger than the

expenditure incurred by the assessee in order to earn such income. In such a situation that disallowance cannot exceed the exempt income so earned by the assessee during the year under consideration. We do not find any error in the view of the Tribunal. We record that the assessee had offered voluntary disallowance of expenditure of Rs.1.30 crores, which is not been disturbed by the Tribunal.

5. The tax appeal is dismissed."

9. In view of such consistent trend of the High Courts, we answer the question in favour of the Assessee. We reverse the decision of the Tribunal to the extent of limiting the disallowance under Section 14A of the Act to a sum of Rs.1,13,72,545/-."

15. In the light of the decision of the Hon'ble Jurisdictional High Court cited supra, the disallowance made by the AO is not maintainable but however, we restrict the addition to an extent of exempt income i.e., Rs.2,03,834/-. The order of ld.CIT(A) is modified accordingly. Thus, ground No.2 is partly allowed.

16. In the result, the appeal of the assessee is partly allowed.

Order pronounced on 9th day of December, 2020.

Sd/-	Sd/-
(Inturi Rama Rao)	**(S.S. Viswanethra Ravi)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

पुणे / Pune; दिनांक / Dated : 9th December, 2020.
Yamini

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A)-2, Pune
4. The Pr. CIT-2, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच, पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

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निजी सचिव / Private Secretary,
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune