

आयकर अपीलीय अधीकरण, न्यायपीठ – “B”, कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH- B, KOLKATA

[समक्ष श्री महावीर सिंह, न्यायीक सदस्य एवं श्री सी. डी. राव, लेखा सदस्य]
Before Shri Mahavir Singh, Judicial Member & Shri C.D. Rao, Accountant Member

आयकर अपील संख्या / ITA Nos. 2270 & 2271 (Kol) of 2010

निर्धारण वर्ष/Assessment Years 2006-07 & 2007-08

DCIT, Circle-4, Kolkata	-वनाम- -Versus-	M/s.The Ashoka Trading Co. Pvt. Ltd.,7 Lyons Range, Kol-1 PAN : AABCT 8856D
(अपीलार्थी/APPELLANT)		(प्रत्यर्थी/RESPONDENT)

अपीलार्थी की ओर से/ For the Appellant : Shri R.K.Saha

प्रत्यर्थी की ओर से/For the Respondent: : S/Shri P.J.Bhinde & B.B.Payra

सुनवाई की तारीख/Date of Hearing : 08/02/2012

घोषणा की तारीख/Date of Pronouncement : 23 /03/2012

आदेश/ORDER

(श्री महावीर सिंह,) न्यायीक सदस्य (Mahavir Singh), Judicial Member :

These appeals by revenue are arising out of separate orders of CIT(A)-IV, Kolkata in appeal Nos. 258/CIT(A)-IV/08-09 and 247/CIT(A)-IV/09-10 dated 25.03..2010. Assessments were framed by ACIT, Circle-IV, Kolkata and DCIT, Circle-IV, Kolkata u/s. 143(3) of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) for Assessment Years 2006-07 and 2007-08 vide their separate orders dated 13.10.2008 and 24.11.2009 respectively.

2. Both the appeals of revenue are delayed by 72 days and 71 days respectively. At the outset, the Id. Counsel for the assessee conceded the position that he has no objection in case the delay is condoned. Since the Id. Counsel for the assessee has conceded the position and in view of the reasons given in condonation petition, we condone the delay and admit the appeals.

3. The first common issue in these appeals of Revenue is against the order of CIT(A) allowing the claim of setting off of short-term capital gains against loss in speculation business. For this, assessee has raised common ground in both the issues. However, we are taking the ground as raised in assessment year 2006-07, which reads as under:

“1. That on the facts and circumstances of the case, Ld.CIT(A), Kolkata has erred in law in setting off of the business loss of Rs.7,87,058/- under the head ‘Short Term Capital gain’ u/s 73(2) whereas this section allows setting off of loss in speculation business only and the A.O. held that the business income to be non-speculative one u/s.28.

2. That on the facts and circumstances of the case, Ld. CIT(A), Kolkata has erred in law in taking the disallowance of Rs.68,930/- u/s.14A by the calculation enumerated as per act to arbitrarily restricting the said addition to Rs.25,000/- only.

3. That the appellant craves for leave to add, delete or modify any of the grounds of appeal before or at the time of hearing.”

4. At the outset, the facts and circumstances in both the appeals are identical and common. Hence, we deal with the appeal in ITA No.2270/Kol/2010 for assessment year 2006-07 and will apply the decision in ITA No.2271/Kol/2010 for assessment year 2007-08 also.

5. Brief facts are that the assessee is a private limited company carrying on business of dealing in shares, operation in share futures and commodity futures. The assessee also advanced unsecured loans to other parties and derived interest income therefrom. According to assessee, shares purchased and held by assessee are investments yielding surplus on sale thereof treated as long term or short term capital gains. The assessee is maintaining regular books of accounts and audited as per the provisions of Income-tax Act as well as Companies Act. AO, in both the years, discussing the provisions of section 73 but without disclosing the facts of the case, held that the declared trading profit is not speculative profit and treated the same as non-speculative profit disallowing speculation loss. Aggrieved, assessee preferred appeal before the CIT(A), who allowed the claim of assessee in both the assessment years,

6. In assessment year 2006-07, the facts narrated in the P&L a/c, Schedule 12 are as under:

SCHEDULE-12

<u>PROFIT/(LOSS) FROM OPFPATTONS:</u>	Year ended
<u>SHARES & SECURITIES</u>	31 st March, 2006
	(In Rs.)
Sales	165,225,960
Closing Stock	<u>32,403,560</u>
	197,629,520
Less: <u>Opening Stock</u>	6,188,179
Purchases	<u>183,056,970</u>
	8,384,370
Profit/(Loss) on Equity/Index Futures/Options	(693,603)
Profit/(Loss) on Commodity Futures	(5,354,074)
Profit/(Loss) on Share Difference	<u>201,941</u>
Profit/(Loss) from Operations	2,538,633

The net income derived amounted to Rs.25,38,633.
Schedule 13 indicates other income.

6.1 Similarly, in assessment 2007-08, the profits are as under:

Profit in Purchase & Sale of shares settled by delivery	Rs.97,04,522/-
Profit in Equity Index Futures & Options	Rs.16,56,086/-
Total	Rs.1,13,60,608/-
Less: Loss in commodity derivatives	Rs.66,40,031/-
Loss in share difference Transactions	Rs. <u>47,608/-</u>
	<u>Rs. 66,87,639/-</u>
	Rs. 46,72,969/-

6.2 It was contended that in assessment year 2006-07, the short-term capital gain is at Rs.1,04,65,227/- and the gross total income of assessee consists mainly of income assessable under the head "Capital gains". Therefore, in view of the Explanation to section 73 of the Act, assessee's loss should have been treated as speculation loss instead of business loss. Similarly, in assessment year 2007-08, the main business of assessee was dealing in shares and commodities as income derived from the same is at Rs.1,13,60,608/-. Therefore, the CIT(A), in this year, allowed the claim of assessee as speculation loss. Aggrieved, revenue is in appeal in both the years.

6.3 The facts narrated above by CIT(A) are undisputed. Revenue could not contend that these facts are in dispute that the principal business of assessee is that of dealing in shares or stocks or commodity exchange. It means that the nature of the business of assessee is speculative business, in view of clear language of Explanation to section 73 where a company carrying on business of purchase and sale of shares shall be deemed to be carrying on speculation business. This position is also explained by him. CBDT circular no. 204 dated 24.07.1976, which contains explanatory notes to Taxation Laws (Amendment) Act, 1975 expresses that the Explanation to section 73 includes cases of group companies but that does not mean that Explanation must be restricted only to group companies and not to other companies who carry on business of sale and purchase of shares either having no controlling interest in other companies or purchasing shares to control other companies.

6.4 The Id. Counsel for assessee also relied on the decision of the Hon'ble Bombay High Court in the case of Prasad Agents (P) Ltd. –vs- ITO, wherein it is held as under:

“There can be no difference between the losses suffered in the course of trading by delivery and losses in terms of the book value. As long as the assessee is carrying on business of trading by way of purchase and sale of shares even if in respect of any financial year there are no transactions and yet the company has stock-in-trade of shares, the book value will have to be considered for the purpose of considering the profit and loss in case of speculative business. There can be no doubt that the Explanation to section 73 cannot be read to mean only when there is purchase and sale of shares in the course of the financial year. The Explanation to said section will cover both, shares which are stock- in-trade and shares which are traded in the course of the financial year, for the purpose of considering the loss and profit for that year. The Tribunal had correctly held that the loss or profit on account of valuation amounted to revenue loss or revenue receipt.[Para 9]”

6.5 In view of the facts and respectfully following the decision of the Hon'ble Bombay High Court in Prasad Agents (P) Ltd. (*supra*), we allow the claim of assessee and the order of CIT(A) is upheld. These grounds of revenue's appeals are dismissed.

7. The next common issue in these appeals of revenue is in regard to deletion of disallowance made by AO by invoking the provisions of section 14A of the Act.

7.1 We have heard rival contentions and facts of the case. We find that in assessment year 2006-07, CIT(A) has restricted the disallowance as Rs.25,000/- as against total disallowance of Rs.68,930/- and in assessment year 2007-08, disallowance is restricted to Rs.2,511/- as against the disallowance made by AO at Rs.22,81,322/- by invoking the provisions of section 14A of the Act r.w.s. Rule 8D of the I. T. Rules, 1962. We find that Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. Co. Ltd. vs. DCIT [2010] 328 ITR 81 (Bom.) has already held applicability of Rule 8D of the Rules as prospective and not retrospective w.e.f. assessment year 2008-09, wherein Hon'ble High Court has also directed to recompute the disallowance in case there is a nexus for expenses with exempt income by laying down the principle as under:

“(v) The provisions of rule 8D of the Income-tax Rules which have been notified with effect from March 24, 2008, shall apply with effect from the assessment year 2008-09;

(vi) Even prior to the assessment year 2008-09, when rule 8D was not applicable, the Assessing Officer has to enforce the provisions of sub-section (1) of Section 14A. For that purpose, the Assessing Officer is duty bound to determine the expenditure which has been incurred in relation to income which does not form part of the total income under the Act. The Assessing Officer must adopt a reasonable basis or method consistent with all the relevant facts and circumstances after furnishing a reasonable opportunity to the assessee to place all germane material on the record;

(vii) The proceedings for the assessment year 2002-03 shall stand remanded back to the Assessing Officer. The Assessing Officer shall determine as to whether the assessee has incurred any expenditure (direct or indirect) in relation to dividend income/income from mutual funds which does not form part of the total income as contemplated under Section 14A. The Assessing Officer can adopt reasonable basis for effecting the apportionment. While making that determination, the Assessing Officer shall provide a reasonable opportunity to the assessee of producing its accounts and relevant and germane material having a bearing on the facts and circumstances of the case”

We further find that the Tribunal, Kolkata Bench on the self same facts in the case of Sagrika Goods & Services Pvt. Ltd. Vs. Income-tax Officer, I.T.A No. 1278/Kol/2010, Assessment Year 2005-06 dated 24th September, 2010 has held as under:

“5. Heard the rival submissions, perused the material available on record and the decisions relied on by the Ld. Authorised Representative of the assessee cited supra. We find that on the issue of disallowance u/s. 14A, this Bench of the Tribunal has been taking a consistent view that this

disallowance should be restricted to 1% of dividend income. Following the same, in this appeal also we hold that the disallowance u/s 14A for earning exempt dividend income should be restricted to 1% of dividend income. The Assessing Officer is accordingly directed to do so and work out the quantum of disallowance. This ground of appeal of the assessee is allowed as directed above."

In view of the above, we restrict the disallowance u/s. 14A of the Act to 1% of total exempt income and direct the Assessing Officer to work out the quantum of disallowance accordingly. This ground of appeal of revenue is partly allowed.

8. In the result, both the appeals of revenue are partly allowed. .

यह आदेश खुले न्यायालय में सुनाया गया है

This order is pronounced in the open Court on 23.03.2012

Sd/-

Sd/-

(सी. डी. राव) लेखा सदस्य
(C.D. Rao) Accountant Member

(महावीर सिंह, न्यायीक सदस्य)
(Mahavir Singh) Judicial Member

(तारीख) Date: 23-03-2012

आदेश की प्रतिलिपि अग्रेषित:-

Copy of the order forwarded to:

1. अपीलार्थी / The Appellant : DCIT, Circle-4, Kolkata
2. प्रत्यर्थी / The Respondent : M/s. The Ashoka Trading Co. Pvt. Ltd., 7, Lyons Range, Kolkata-700 001.
3. आयकर कमिशनर (अपील) /CIT(A), Kolkata
4. आयकर कमिशनर/The C.I.T., Kolkata
5. वभागिय प्रतिनीधी / DR, ITAT, Kolkata Benches, Kolkata
6. Guard file.

सत्यापित प्रति/True Copy,

आदेशानुसार/ By order,

(mst/sr.ps)

Asstt. Registrar.