IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH : KOLKATA
[Before Hon'ble Shri M.Balaganesh, AM & Hon'ble Shri S.S.Viswanethra Ravi, JM]

I.T.A No. 856/Kol/2017
Assessment Year : 2011-12

Joy Beauty Care (P) Ltd. -vs- DCIT Circle -10, Kolkata

[PAN: AABCJ 3444 R]

(Appellant) (Respondent)

For the Appellant : Shri Dev Kumar Kothari, Ld. AR
For the Respondent : Smt. Ranu Biswas, Addl. CIT

Date of Hearing : 23.08.2018

Date of Pronouncement : 05.09.2018

ORDER

Per M.Balaganesh, AM

This appeal of the assessee arises out of the order of the Learned Commissioner of Income Tax (Appeals)-15, Kolkata [in short the ld CITA] in Appeal No. 401/CIT(A)-15/15-16/Cir-10/R&T/Kol dated 24.02.2017 passed against the order passed by the DCIT Circle-10, Kolkata [in short the ld. AO] under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') dated 22.01.2014 for the Asst Year 2011-12.

2. The first issue to be decided in this appeal is as to whether the Ld. CIT(A) was justified in reducing the disallowance made under section 14A of the Act to Rs. 6,10,940/- in addition to suo-moto disallowance to Rs. 32,830/- made by assessee in the facts and circumstances of the case. The assessee has also raised an alternative ground with regard to disallowance made u/s 14A pleading that the provisions of 14A of the Act *per se* are not applicable in the instant case. Hence, we reframe the question to be adjudicated by us as under with regard to impugned issue:-

"1. Whether in law and in the facts and circumstances of the case, the provisions of section 14A of the Act could be made applicable to the assessee's appeal?

2. Whether in the facts and circumstances of the case, the Ld. CIT(A) was justified in reducing the amount of disallowance u/s 14A of the Act under Rule 8D(2)(ii) of the rules."

3. The brief facts of the issue are that the assessee is a private limited company engaged in the business of manufacture of cosmetics. The assessee had derived dividend income of Rs. 12,43,558/- and claimed the same as exempt in the return of income. The assessee company made suo moto disallowance of Rs. 32,830/- u/s 14A of the Act in the return of income. The A.O. recorded satisfaction in the assessment order that the disallowance made by the assessee was considered having regard to the accounts of the assessee and apparently proceeded to determine the disallowance under section 14A of the Act by applying 2nd & 3rd limb of Rule 8D(2) of the Rules as under:-

Under 8D(2)(ii)	*Rs. 7,82,830/-*
Under 8D(2)(iii)	*Rs. 3,26,941/-*
Total	*Rs. 11,09,771/-*
Less disallowance made by the assessee	*Rs. 32,830/-*
Total disallowance u/s 14A to be made	*Rs. 10,76,941/-*

4. The Ld. CIT(A) observed that there is no dispute with regard to disallowance made by the A.O. under Rule 8D(2)(iii) amounting to Rs. 3,26,941/- before him. The only dispute was with regard to the second limb of Rule 8D(2) of the rules. The assessee pointed out before Ld. CIT(A) that the learned A.O. had taken wrong figure of average value of assets at Rs. 4,99,29,027/-. It was pointed out that this figure has been arrived by considering only the value of current assets after netting off the current liabilities. The

assessee submitted that the average value of assets should be computed at Rs. 15,36,30,176/-. The Ld. CIT(A) observed that both the assessee's figure as well as the figure adopted by the Ld.AO was wrong. From the perusal of the balance sheet of the assessee company, the Ld. CIT(A) observed that the total value of assets of the company was 13,84,98,503/- and the average value of assets thereon was Rs. 12,33,65,842/-. Accordingly, he recomputed the disallowance figure under Rule 8D(2)(ii) at Rs. 3,16,829/-. Accordingly, the Ld. CIT(A) confirmed the total disallowance as under:

Under 8D(2)(ii)	*Rs. 3,16,829/-*
Under 8D(2)(iii)	*Rs. 3,26,941/-*
Total	*Rs. 6,43,770/-*
Less disallowance made by the assessee	*Rs. 32,830/-*
Balance disallowance sustained by Ld. CIT(A)	*Rs. 6,10,940/-*

Aggrieved the assessee is in appeal before us.

5. The learned AR argued that the assessee has derived Short Term Capital Gain and the Long Term Capital Gain. The Long Term Capital Gain derived by the assessee though claimed as exempt under the normal computation provisions of the Act, was actually sought to be taxed by the Act under section 115JB of the Act. Accordingly, he argued that the assessee had indeed paid taxes towards Long Term Capital Gain. Hence, it was argued that the said Long Term Capital Gain cannot be considered as an item which does not form part of total income under the Act within the meaning of Section 14A of the Act. He also argued that the dividend has been taxed under section 115O of the Act and hence the same cannot be considered as an item which does not form part of the total income under the Act. Based on these arguments, he submitted that the provisions of section 14A of the Act per se should not be made applicable in the instant case.

6. We have heard rival submissions in this regard and we are afraid to concur with the views taken by the learned AR due to the followings reasons:

(a) First of all, the assessee's total income for the year under consideration has been computed under normal provisions of the Act since the tax payable under 115JB was less then tax payable under normal provisions of the Act. This fact is very much evident from the assessment order itself. Hence the plea of the learned AR that the assessee had paid tax on Long Term Capital Gain under section 115JB does not come to the rescue of the assessee. It is a fact that long term capital gain has been claimed as exempt by the assessee and accepted by the Ld. CIT(A) under normal provisions of the Act, against which action of the Ld. CIT(A), the revenue had not preferred any appeal before us.

(b) Only the dividend income had suffered dividend distribution tax u/s 115O and that too in the hands of dividend distributing company and not in the hands of the assessee herein. The assessee company having received dividend of Rs. 12,43,558/- had not suffered any tax thereon and had claimed the same as exempt in its return of income which is in accordance with the provisions of the Act.

Hence the preliminary question reframed herein above that the provisions of Section 14A of the Act per se are not applicable to the assessee is decided against the assessee.

7. With regard to the computation of disallowance u/s 14A of the Act read with Rule 8D of the rules, we find from the balance sheet of the assessee that the assessee has got sufficient own funds of Rs. 12.93 crores whereas investments made by the assessee was only Rs. 7.54 crores. Hence it can be safely presumed that the investments were made only out of the own funds of the assessee. Accordingly by placing reliance on the decision of Hon'ble Bombay High Court in the case Reliance Utilities & Power Ltd. reported in 313

ITR 340 (Bom), we hold that no disallowance under the second limb of section 8D(2)(ii) towards interest is required to be made in the instant case.

8. With regard to the disallowance made under Rule 8D(2)(iii) of the rules amounting to Rs. 3,26,941/-, we find that the Co-ordinate Bench of this tribunal in the case of REI Agro Ltd. reported in 144 ITD 141 had held that only those investments which had resulted dividend income should be considered for the purpose of computing disallowance thereon. Accordingly, we direct the Ld. A.O. to recompute the disallowance to be made under Rule 8D(2)(iii) in the light of the decisions of this tribunal 144 ITD 141 (supra). Needless to mention that the Assessing Officer while re-computing the same should give deduction of Rs. 32,830/- being the amount already disallowed u/s 14A by the assessee. Accordingly, ground no. 1 and 4 raised by the assessee is partly allowed for statistical purposes and ground no. 3 raised by the assessee is dismissed.

9. The next ground to be decided in this appeal is as to whether the Ld. CIT(A) was justified in upholding the disallowance of Rs. 18,93,788/- on account of Portfolio Management Services (PMS) fees paid as not eligible for deduction while computing the capital gains of the assessee, in the facts and circumstances of the case.

10. The brief facts of the issue is that the assessee had declared Long Term Capital Gain of Rs. 36,62,053/- and Short Term Capital Gain of Rs. 7,59,397/- . For the purpose of computing the profit on sale of shares in the Short Term Capital Gain, Portfolio Management Services (PMS) expenses of Rs. 18,93,788/- was deducted by the assessee and the net amount of Rs. 7,59,397/- was offered as Short Term Capital Gain. The assessee claimed that all the share transactions in investment portfolio and services of professional portfolio managers were availed by it and PMS fee was accordingly paid. The Ld. A.O. held that the share transactions carried out by the assessee are to be considered as income from business because the services of portfolio managers were

availed by the assessee. He observed that the money was given by the assessee to portfolio management services provider with the motive to earn profit. The Ld. A.O. also placed reliance on various decisions in support of his contentions.

11. It was pointed out before the Ld. CIT(A) that none of the cases cited by the Ld. A.O. ever held that transactions through Portfolio Management Services would necessarily be in the nature of business transactions. The assessee placed reliance on the co-ordinate bench decision of Pune Tribunal in the case of KRA Holding & Trading Pvt. Ltd. vs DCIT among others. The Ld. CIT(A) held that this decision of Pune Tribunal has been distinguished in several decisions rendered by Bombay Tribunal and accordingly decided this issue against the assessee. Aggrieved the assessee is in appeal before us.

12. We have heard rival submissions. At the outset, we find that the Ld. CIT(A) had accepted that the gains on sale of shares through PMS providers to be taxed under the head capital gains. Against these findings of the Ld. CIT(A), the revenue has not preferred the appeal before us as per the material available on record. The assessee placed reliance on the decision of Co-ordinate Bench of Pune Tribunal in the case of KRA Holding & Trading Pvt. Ltd. vs DCIT in ITA Nos. 499, 500, 1320 to 1322 of 2008 and 434 of 2009 and 806 of 2009 dated 31.05.2011 reported in 2011 (5) TMI 498 ITAT Pune. There were primarily two issues before the Pune Tribunal in the aforesaid cases:-

> *1. Whether the transactions of purchase and sale of shares carried out through PMS providers would be taxed under business income or under the head capital gain.*
>
> *2. Whether PMS providers fees paid to M/s. ENAM would be allowable as deduction under section 48 of the Act.*

Both the questions were decided in favour of the assessee by the Pune Tribunal.

13. The revenue preferred further appeal to Hon'ble Bombay High Court against the order. We find that the Hon'ble Bombay High Court while admitting the substantial questions of law admitted only one question which is as under:

> *"Whether on the facts and circumstances of the case, the ITAT was justified in holding that the income earned by the assessee by the portfolio management scheme was liable to be assessed under the head 'capital gains' instead of being assessed under the head 'profit & gains of business or profession"*

14. This goes to prove that the other issue decided in favour of the assessee by Pune Tribunal i.e. allowability of PMS fees as deduction under section 48 of the Act was not admitted by Hon'ble Bombay High Court. Hence the decision of Pune Tribunal had attained finality. Respectfully following the said decision, we hold that the PMS fees paid by the assessee in the sum of Rs. 18,93,788/- is eligible for deduction while computing Short Term Capital Gain. Accordingly, ground no 2 raised by the assessee is allowed.

15. Ground no 5 raised by the assessee is general in nature and does not require any specific adjudication.

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

Order pronounced in the Court on 05.09.2018

Sd/-	Sd/-
[S.S. Viswanethra Ravi]	[M.Balaganesh]
Judicial Member	Accountant Member

Dated : 05.09.2018
Biswajit, Sr. PS

Copy of the order forwarded to:

1. Joy Beauty Care (P) Ltd., 159, Mahamayatala, Garia Main Road, Kol - 84

2. DCIT Circle – 10, P-7, Chowringhee Square, Kolkata – 69.

3..C.I.T.(A)- 4. C.I.T.- Kolkata.

5. CIT(DR), Kolkata Benches, Kolkata.

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By Order

Senior Private Secretary

Head of Office/D.D.O., ITAT, Kolkata Benches