THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "B" BENCH

Before: Shri Waseem Ahmed, Accountant Member
And Shri Siddhartha Nautiyal, Judicial Member

ITA No. 248 /Ahd/2020
Assessment Year 2002-03

The DCIT, Cir. 1(1)(1), Ahmedabad (Appellant)	Vs	Applitech Solution Ltd. 503, Paritosh Nr. Darpan Academy, Usmanpura, Ahmedabad-380013 PAN: AABCA8332P (Respondent)

Cross Objection 76/Ahd/2020
(In ITA No. 248 /Ahd/2020)
Assessment Year 2002-03

Applitech Solution Ltd. 503, Paritosh Nr. Darpan Academy, Usmanpura, Ahmedabad-380013 PAN: AABCA8332P (Appellant)	Vs	The DCIT, Cir. 1(1)(1), Ahmedabad (Respondent)

Assessee by: **Shri Anil Kshatriya, A.R. &**
Shri Alay Anil Kshatriya, A.R.
Revenue by: **Shri Sudhendu Das, CIT-D.R.**

Date of hearing : 16-05-2023
Date of pronouncement : 19-05-2023

आदेश/ORDER

PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-

The appeal by the Department and the Cross Objection filed by the assessee are against the order of ld. CIT(A)-1, Ahmedabad in proceeding u/s. 250 vide order dated 06/01/2020 passed for the assessment year 2002-03.

2. The Department has raised the following grounds of appeal:-

"(1)The CIT(A) has erred in law and facts in directing the AO to allow the claim of depreciation of Rs.10,25,20,281/-.

(2)The CIT(A) has erred in law and facts in directing the AO to allow the claim of interest expenses of Rs.2,91,97,097/- to the assessee.
(3)The CIT(A) has erred in law and facts in deleting the Section 14A disallowance of Rs. 1,47,487/-.

(4) It is, therefore, prayed that the order of ld. CIT(A) may be set aside and that of the Assessing Officer be restored."

3. The assessee has raised following grounds in the Cross Objection:-

"1. On the peculiar facts and circumstances of the case of the appellant, as well as in law, the Ld. CIT(A) has grossly erred in not judicially deciding specific ground raised on the notices issued u/s. 143(2) of the Act, having not been issued within the prescribed time as per proviso to section 143(2) of the Act, hence they are barred by limitation and the assumption of jurisdiction is invalid.

2. On the peculiar facts and circumstances of the case of the appellant, as well as in law, the Ld. CIT(A) has grossly erred in not judicially deciding specific ground raised before him that "all the conditions stipulated to assume a valid jurisdiction are not complied with in absence of reasons recorded, hence the notice issued u/s.148 of the Act is illegal, invalid and void ab initio and subsequent assessment order is also bad in law", by relying on unsupported/non-existing facts and thereby further erred in dismissing the ground no.3, so raised before him.

> *3. On the peculiar facts and circumstances of the case of the appellant, as well as in law, the Ld. CIT(A) has grossly erred in not judicially deciding specific ground raised before him that "t/?e notice issued u/s.148 without disposing off original return of income and by keeping the same pending without terminating the proceedings is illegal, invalid and without jurisdiction."*

Ground Nos. 1 & 2 (claim of depreciation of Rs. 10,25,20,281/- and claim of interest expenses of Rs. 2,91,97,097/-)

4. The brief facts of the case are that the assessee is engaged in business of development of software and providing IT consultancy services. For assessment year 2000-01, the then A.O. disallowed assessee's claim of depreciation on computer hardware and interest paid to bank for term loan and working capital vide order dated 28-03-2023. Subsequently, the assessee preferred appeal against the order of A.Y. 2000-01 before ITAT. In the meantime on the basis of order for A.Y. 2000-01, the successor assessing officer reopened the assessments for AY 1997-98, 1998-99, 1999-2000, 2001-02 and 2002-03 (impugned assessment year) and passed re-assessment orders vide orders dated 23-03-2005, making disallowance of depreciation and interest relying primarily upon the order passed by his predecessor for A.Y. 2000-01. Being aggrieved, the assessee preferred appeal before the CIT(A) for all these years.

5. Meanwhile, for AY 2000-01, the ITAT vide order dated 19-04-2016 in ITAT No. 1452/Ahd/2014, decided the issue of depreciation and interest in favour of the assessee.

6. Subsequently, assessee's appeals for AYs 1999-2000, 2001-02 and 2002-03 came up for hearing before ld. CIT(A). The CIT(A), following the

order of ITAT vide order dated 19-04-2016, deleted the addition made by the AO for all the three years in respect of assessee's claim of depreciation on computer hardware and interest paid to bank for term loan and working capital. While passing the order ld. CIT(A) made the following observations:-

> *"14. Therefore, considering overall facts and binding effect of jurisdictional Tribunal's order dated 19/4/2016 (supra) I am inclined to agree with the submissions made by the appellant in entirety. On appreciation of all the above, I find that there is no justification to disallow the purchases made from the third parties i.e. other than RIPL & VCPL or even RIPL & VCPL as the same have been allowed by Hon'ble ITAT in appreciation of facts. No evidence or material is brought on record by the A.O. to hold it otherwise, the addition was made on the basis of statements of said persons and no efforts were made by the A.O.to dismiss the veracity of the contents of affidavits filed by the the present directors. The payments for the purchases of computers have been made by account payee cheques. No evidence is brought on record that the computers were physically not available for the year under consideration. Finally, all other evidences produced before A.O. and available on record goes to establish beyond doubt that the appellant had purchased computers and is eligible for the claim of depreciation on it.*
>
> *15. Considering the totality of the facts and peculiar circumstances of the case and respectfully following the orders of the Hon. Tribunal dated 19.04.2016 (Supra), the issue is fully covered by virtue of Hon. Tribunal's orders, as well as appellate orders for A.Y. 1997-98 & 1998-99 (supra). Therefore, I am of the considered view that the appellant had purchased computer hardware and its claim of deprecation thereof has been genuine one and direct the AO to allow the claim of depreciation and delete the disallowance of Rs.10,25,20,281/-.*
>
> *In the result, the ground no.4 of appeal is* ***allowed*** *and decided in favour of the appellant."*

7. The Department is in appeal before us in respect of aforesaid relief granted by CIT(A) with respect to aforesaid two issues.

8. Before us, the ld. DR submitted that a survey was conducted on the premises of the assessee wherein on the basis of statements of the officers of the company, it was found that assessee had recorded sham purchase transaction of the computers. The DR pointed out that in the assessment order for AY 2000-01, the A.O. observed that the main Directors of alleged vendor company Rahul Info Tech Pvt. Ltd. and Vandan Computers Ltd. were found to be the employee and his wife of the assessee company and who by way of statements and affidavits categorically denied any actual sales made by companies run and operated in their name to the assessee company. Accordingly, the AO disallowed the depreciation amount of Rs. 10,25,20,281/- and added the same to the total income of the assessee. Further, the interest paid on the above alleged bogus purchases, amounting to Rs. 2,91,97,097/- was also disallowed and added to the income of the assessee. Accordingly, from the observations made in the assessment order, the ld. DR submitted that clearly the purchases are bogus in nature and therefore CIT(A) erred in deleting the additions on depreciation with respect to bogus purchases and the interest claimed by way of deduction in respect of such bogus purchases.

9. In response, the counsel for the assessee submitted that the issue is covered in favour of the assessee due to Tribunal's order dated 19-04-2016 in ITA No. 1452/Ahd/2014 and ld. CIT(A) has correctly followed the order

passed by Hon'ble ITAT in assessee's own case while allowing the appeal of the assessee with respect to the aforesaid issues.

10. We have heard the rival contentions and perused the material on record. We are of the considered view that the ld. CIT(A) in his order has analysed the fact in great detail before coming to the conclusions that in the instant facts, the assessee is eligible to claim depreciation with respect to the aforesaid assets and consequentially, the ld. CIT(A) also upheld the claim of interest on loan taken with respect to aforesaid assets. We, further observe that ITAT vide order dated 19-04-2016 has also decided the issue with respect to the aforesaid two grounds of appeal in favour of the assessee for AY 2000-01. Further, it is seen that the assessment order for the impugned AY 2002-03 is based primarily on the observations made by the AO for assessment year 2000-01, which has been decided in favour of the assessee by the ITAT. Accordingly, we are of the considered view that CIT(A) has not erred in facts and in law in allowing the appeal of the assessee with respect to the aforesaid two issues. Further, it would be useful to reproduce the relevant extracts of the ITAT ruling for ready reference. **In respect of depreciation, the ITAT made the following observations:**

> *"24. For verifying the genuineness of the purchases, statement of Rahul Parikh & Vandna Parikh were recorded by A.O. In the respective statement, both the persons denied of such transaction with the assessee company. Based on these statement, the claim of depreciation was disallowed. As mentioned elsewhere, the ITAT restored the issue to the files of the A.O. for fresh adjudication. During the course of assessment proceedings, it was brought to the notice of the A.O. that the Parikh couples have left India for good and are now settled at Kuwait. It was also brought to the notice of the*

A.O. that Rahul & Vandna had already resigned as Directors from their respective companies with effect from 15/10/2001. Therefore, there was no credibility in their statements recorded by A.O. on 21/02/2003. The affidavits of present Directors Sahid Saved and Ketan Parikh were filed with the A.O. to established the genuineness of the purchase of computers.

25 In the de-novo proceedings, we find that the A.O. did nothing to enforce the attendance of Parikh couple so that the assessee could cross examine them. We also filed that no efforts were made by the A.O. to dismiss the veracity of the contents of the Affidavits of present Directors namely Sahid Sayed & Ketan Parekh; we also find that the payments for purchases of computers have been accepted by the A.O. We also find that parts of the computers have been financed by the bank and no adverse inference has been drawn by the bank while financing the same. The allegation of the revenue that during the course of survey proceedings, the computers were not found at the surveyed premises do not hold any good, *since it is a fact that the entire premises of the assessee located at various places have not been surveyed. Therefore, possibility of computer hardware installed at those premises cannot be rule out. One more important factor which has to be considered and which goes in favour of the assessee is the claim of short payment of octroi department. The assessee has been found to have made short payments of octroi by Rs.1,71,000/-. There is no adverse remark by the revenue authorities in so far as insurance policies are taken to insure the computers.*

26. Considering the aforementioned facts, in our considered opinion, the circumstantial evidences are in favour of the assessee. The revenue's rejection of the claim of depreciation is only based on the statements of Parikh couple who were not allowed to be cross examined by the assessee; therefore, their statements are in complete violation of principles of natural justice. On the basis of circumstantial evidences mentioned elsewhere, we are of the opinion that the assessee had purchased computers and is eligible for the claim of depreciation. We accordingly set aside the findings of Ld.CIT(A) and direct the A.O. allow the claim of depreciation. This ground is accordingly allowed."

In respect of interest, the ITAT made the following observations:-

> *"Para-28., during the course of the assessment proceedings, it was explained that the interest was paid on term loans taken from Co-operative Bank of Ahmedabad loan as working capital loan. The loan taken were used for the business purpose of the company. It was explained that out of total loan of Rs.5 crores, interest on term loan is paid to Bank and rest of interest pertained others on working capitals. In the first round of litigation, the A.O. did not accept the contention of the assessee because the purchase of computers have been held to be bogus. In the set aside proceeding, the A.O. simply borrowed the findings of his own predecessor given in the first round of litigation. We have carefully gone through the contents of the facts in issues, there is no dispute that the disallowance is based upon the findings given in the first round of litigation. Since we have held the purchase of computers to be genuine as per our detailed decision / discussion qua first grievance of this appeal. We have no hesitation to hold that the money has been borrowed for the purpose of business and therefore any interest paid has to be allowed as business expenditure. The second grievance is accordingly allowed".*

11. Accordingly, in view of the above, ground nos. 1 and 2 of Department's appeal are dismissed.

Ground No. 3 (Deleting the section 14A disallowance of Rs.1,47,487/-)

12. The brief facts in relation to this ground of appeal are that in the return of income, the assessee had shown exempt income from dividend amounting to Rs. 4,62,005/-. Accordingly, the AO made pro-rata disallowance of administrative expenses amounting to Rs. 1,47,487/-.

13. The assessee filed appeal against the assessment order before CIT(A), the assessee submitted that the expenditure relating to earning of dividend income is excluded from admissibility u/s. 57 of the Act only from 01-04-2004 and therefore, there was no question of disallowance so far as AY 2002-03 is concerned. Further, Rule 8D has been notified w.e.f. 24-03-2008 and is not retrospective in nature and shall apply from AY 2008-09. Accordingly, no disallowance can be made in AY 2002-03 in view of the decision of **CIT vs. Godrej Boyce 43 DTR 12(Bombay).** Accordingly, CIT(A) decided this issue in favour of the assessee with the following observations:

> ***"DECISION:***
>
> *I have gone through the submission of the appellant and the finding of the A.O. in the assessment order. I find that there is considerable force in the submission of the appellant that the word "other than dividends referred to in section 115-0" are inserted by the Finance Act, 2003 effective from 01.04.2004. Thus, the expenditure if any related to earning of dividend income is excluded from admissibility u/s 57 of the Act only from 01.04.2004. Further the provisions of Rule 8D which have been notified with effect from 24.03.2008 are not retrospective in nature and shall apply with effect from A.Y.2008-09. I have also gone through the case laws relied by the appellant (P.B.P.34). Recently the Hon'ble Supreme Court in a case of CIT Vs, Essar Techno holdings Ltd reported in [2018] 401 ITR 445 has held that applying the principle of statutory interpretation for interpreting retrospectivity of a fiscal statute and looking into the nature and purpose of section 14A(2) & (3) as well as purpose and intent of Rule 8D coupled with the explanatory notes in the Fin. Bill, 2016 & the department's understanding as reflected by circular dated 28.12.2016, the Apex Court was of the opinion that Rule 8D was intended to operate prospectively.*

Respectfully following the decisions of the Hon'ble Courts including Supreme Court (supra) the disallowance u/s 14A of the Act for the year under consideration is not justified. The same is deleted.

In the result the ground raised by the appellant is allowed."

14. The Department is in appeal before us against the aforesaid relief granted by the ld. CIT(A). The contention of the ld. DR is that even if Rule 8D does not strictly apply to the impugned under consideration, even then reasonable amount should have been disallowed by the ld. CIT(A) looking into the instant facts. In response, the counsel for the assessee relied on the observations made by the Ld. CIT(A) in the appellate order.

15. We have heard the rival contentions and perused the material on record. We observe that in case of **CIT vs. Godrej & Boyce 43 DTR 12 (Bombay),** on which the assessee has placed reliance upon, the Bombay High Court has held that even prior to the assessment year 2008-09, when Rule 8D was not applicable, the Assessing Officer had to enforce the provisions of sub-section (1) of section 14A. For that purpose, the Assessing Officer was duty bound to determine the expenditure which had been incurred in relation to income which did 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. Further, the Hon'ble Supreme Court in the case of **Godrej & Boycevs vs. DCIT 81 taxman.com 111 (SC),** held that section 14A would apply to dividend income on which tax is payable u/s. 115-O.

Accordingly, looking into the instant facts, a disallowance of Rs. One lakh may be made to serve the interest of justice.

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

Now we shall take up the cross objection filed by the assessee.

17. Before us, the primary contention of the counsel for the assessee is that the order has been passed by the ld. AO u/s. 143(3) of the Act and the same is time barred. This is for the reason that the return of income for the impugned assessment year was filed by the assessee on 26-11-2002. Time limit for issuance of notice u/s. 143(2) was 12 months from end of the assessment year i.e. 31-03-2004, whereas the first notice was issued by the AO on 25-10-2004, which as per the counsel for the assessee is clearly time barred. Further, the counsel for the assessee submitted that even the "reasons for reopening" have not been supplied to the assessee till date, and therefore, even for this reason, the assessment order is bad in law and hence liable to be set aside. The counsel for the assessee further submitted that on a perusal of the assessment order, it cannot be inferred that the order was passed u/s. 148 of the Act and since the order was passed u/s. 143(3), since the issuance of notice was itself time barred, the assessment order is liable to be set aside.

18. In response, the ld. DR submitted that the order was passed u/s. 148 r.w.s. 143(3) of the Act and it was only on account of a clerical error that there was an omission on part of the AO in not mentioning the correct

section. However, the DR pointed out that in the notice of demand, the correct section (section 148) has been mentioned. Further, the ld. DR pointed out that even if notice issued u/s. 143(2) of the Act is time barred, even then the order passed u/s. 148 is not time barred and the same is not liable to be set aside on this ground alone.

19. We have heard the rival contentions and perused the material on record. The primary contention of the counsel for the assessee is that the assessment order has been passed for the impugned assessment year u/s. 143(3) of the Act and the order is barred by limitation since the first notice u/s. 143(2) of the Act was issued beyond the due prescribed date. Further, the counsel for the assessee submitted that from the contents of the assessment order, nowhere it can be inferred that such order was passed u/s. 147 of the Act. Accordingly, the assessment order is liable to be set aside on the ground of jurisdiction itself. Without prejudice, the counsel for the assessee submitted even otherwise no "reasons for reopening" have been supplied to the assessee despite a specific request and therefore, in view of the decision of GKN Driveshaft (SC), the order passed is liable to be set aside. However, we observe that in the Form no. 35 filed by the assessee against the order of assessing officer, the assessee has himself mentioned that the order appealed against has been passed u/s. 147 r.w.s 143(3) of the Act dated 23-03-2005. Further, even before us, the assessee filed "brief note" dated 08-07-2022, wherein the counsel for the assessee has himself submitted as under:-

> *"Subsequently, the case came to be reopened u/s. 147 of the Act by issue of notice u/s. 148. Thereupon the AO has passed re-assessment order u/s. 147 r.w.s. 143(3) of the Act on 23-03-2005 on total income of Rs. 12,05,10,130/-."*

20. Further, we observe that the assessee filed another submission dated 11-07-2022, wherein the assessee submitted as under:-

> *"In the meanwhile, taking basis of the order for A.Y.2000-01, the successor A.O reopened the assessments for A.Y. 1997-98, 1998-99 and 1999-2000, 2001-02 & 2002-03 and passed re-assessment orders u/s. 143(3) r.w.s. 147 of the Act on 23.03.2005, making disallowance of depreciation and interest solely relying upon the order passed by his predecessor for A.Y. 2000-01."*

21. Accordingly, we observe that while on one hand, during the course of argument, the counsel for the assessee has pressed for dismissal of the assessment order on the ground that the same was passed u/s. 143(3) of the Act, whereas in the written submissions filed before us and on perusal of Form No. 35, the assessee has consistently submitted that the assessment order passed was u/s. 147 r.w.s. 143(3) of the Act. Accordingly, since, we observe that there is some confusion relating to the above issue. Therefore, in the interest of justice, this issue is being set aside to the file of CIT(A) to ascertain the correct set of facts. It needs to be ascertained whether any notice u/s. 148 of the Act was issued to the assessee, whether reasons for reopening of assessment were furnished to the assessee, whether the assessee has sought for " reasons" for reopening the case for the impugned assessment year and whether it could be inferred that non-mentioning of section 147 in the assessment order was an inadvertent omission if other

conditions of proceedings u/s. 147/148 of the Act have been complied with by the Department. Accordingly, this issue is being set aside to the file of CIT(A) with the aforesaid directions.

22. In the result, the cross objection filed by the assessee is allowed for statistical purposes

23. In the combined result, the appeal filed by the Department is partly allowed and cross objection filed by the assessee is allowed for statistical purposes.

Order pronounced in the open court on 19-05-2023

Sd/-	**Sd/-**
(WASEEM AHMED)	**(SIDDHARTHA NAUTIYAL)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad : Dated 19/05/2023

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद