आयकर अपीलीय अधिकरण
मुंबई पीठ " ई ",मुंबई
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री अमरजीत सिंह, लेखाकार सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH " E ", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER&
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

आअसं. 1651/मुं/2013 (नि. व. 2008-09)
ITA NO.1651/MUM/2013(A.Y.2008-09)

Krishnamurthy Thiagarajan,
No.41, 36th Main Dollar Scheme,
BTM Layout, 1st Stage,
Bangalore – 560 068.
PAN: AADPK-5126-C ..... अपीलार्थी/Appellant

बनाम Vs.

The ACIT, Circle 6(3),Mumbai,
Room No.522 (5th Floor),
Aaykar Bhavan, M.K.Road,
Mumbai – 400 020. ..... प्रतिवादी/Respondent

Assessee by : Shri Miteshkumar Gupta, CA with
Shri V.Shivkumar, CA
Revenue by : Shri P.D.Chougule, SR.DR
सुनवाई की तिथि/ Date of hearing : 20/02/2024
घोषणा की तिथि/ Date of pronouncement : 20/02/2024

आदेश/ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the order of Commissioner of Income Tax(Appeals)-12, Mumbai [in short 'the CIT(A)'] dated 08/11/2012, for the Assessment Year 2008-09.

2. In appeal assessee has assailed additions/disallowances on account of:

(i) Management Fee paid to M/s. BNP Paribas Investment Services India Pvt. Ltd. – Rs.1,71,028/-

(ii) Disallowance of Rs.5,32,123/- u/s. 14A of the Income Tax Act, 1961 [in short 'the Act'] r.w. Rule 8D(2).

3. Shri Miteshkumar Gupta appearing on behalf of the assessee submitted that during the period relevant to Assessment Year under appeal, the assessee has earned short term capital gain of Rs.10,04,322/- on sale of Securities. The assessee paid Rs.1,71,028/- to M/s. BNP Paribas Investment Services India Pvt. Ltd. (in short 'BNP Paribas') as management fees for sale of securities. The management fee paid to BNP Paribas is inextricably linked to earning of short term capital gain. The payment of management fee is not disputed by the Revenue. The Assessing Officer disallowed payment of the said fee only for the reason that management fee is not an allowable deduction u/s. 48 of the Act. The assessee had reduced management fee from short term capital gain and has offered net short term capital gain to tax. The Assessing Officer and the CIT(A) without appreciating the facts disallowed the payment of management fee. The ld.Authorized Representative of the assessee in support of his submissions that management fee is allowable u/s. 48 of the Act placed reliance on the following decisions:

(i) KRA Holding and Trading Investments Pvt. Ltd. vs. DCIT, ITA No.703/PN/2012 for A.Y.2008-09 decided on 19/09/2013; and

(ii)Nadir A. Modi vs. JCIT, ITA No.2996/Mum/2010 & 4859/Mum/2012 for A.Y. 2005-06, decided on 31/03/2017.

3.1 In respect of disallowance u/s. 14A of the Act, the ld.Authorized Representative of the assessee submitted that the assessee has earned exempt income from:

S.No.	Pariculars	Amount(Rs.)
1.	PPF Interest	3,227.00
2.	Dividend from Bonus Shares	20,761.40
3.	Dividend from Mutual Funds	8,52,133.40
	Total	**8,76,121.80**

No suo-moto disallowance was made by the assessee for earning of exempt income. The Assessing Officer without recording his dissatisfaction as envisaged u/s.14A of the Act invoked the provisions of Rule 8D and made disallowance of expenditure for earning of exempt income under Rule 8D(2)(iii) i.e. on account of 0.50% of the average investments.

4. Per contra, Shri P.D.Chougule representing the Department vehemently defended the impugned order. The ld. Departmental Representative submitted that the management fee paid to BNP Paribas by the assessee is not allowable u/s. 48 of the Act. Section 48 allows deduction of expenditure incurred wholly and exclusively in connection with the transfer of capital asset or the cost of acquisition of asset. The management fee paid by the assessee neither relates to the expenditure in connection with the transfer nor acquisition of capital asset. Hence, the Assessing Officer and the CIT(A) have rightly disallowed assessee's claim of management fee. In respect of disallowance u/s. 14A of the Act, the ld. Departmental Representative submits that a perusal of the assessment order would show that the Assessing Officer has recorded dissatisfaction in respect of assessee's Nil disallowance of expenditure for earning exempt income u/s. 14A of the Act. He further placed reliance on the decision in the case of Godrej & Boyce Mfg.Co. Ltd. vs. DCIT, 328 ITR 81(Bom) to contend that Assessing Officer has rightly invoked the provisions of Rule 8D in Assessment Year 2008-09.

5. We have heard the submissions made by rival sides and have examined the orders of authorities below. We have also considered the decisions on which both sides have placed reliance to support their respective submissions. The assessee in appeal has raised two issues:

(i) Disallowance of management fee - Rs. 1,71,028/-

(ii) Disallowance u/s. 14A of the Act - Rs. 5,32,123/-

Management Fees:

6. During the period relevant to the assessment year under appeal the assessee has earned short term capital gain of Rs.10,04,322/-. The assessee paid management fee to BNP Paribas Rs.1,71,028/-. The assessee in its books has not separately debited management fees but has reduced the same from short term capital gains. The Assessing Officer and the CIT(A) has outrightly disallowed assessee's claim of management fees on the ground that it is not an allowable expenditure u/s. 48 of the Act as it is not wholly and exclusively incurred in connection with transfer of asset.

7. Section 48 of the Act gives the mode of computation of income chargeable under the head 'Capital Gains'. The section allows deduction in respect of expenditure incurred wholly and exclusively in connection with transfer of capital asset and the cost of acquisition and cost of improvement, if any. The contention of the assessee is that the management fee paid by the assessee to BNP Paribhas is linked to earning of short term capital gain arising from transfer of securities. We find that similar issue had come up before the Co-ordinate Bench in the case of KRA Holdings & Trading Investments Pvt. Ltd. (supra). The Revenue rejected assessee's claim of deduction of Portfolio Management Fee for similar reasons as has been

expressed in the instant impugned order. The Revenue in the said case had also placed reliance on the decision of Homi K. Bhabha vs. ITO in ITA No.3287/Mum/2009 decided on 23/09/2011 [48 SOT 102 (Mum)]. The Tribunal after considering the contentions of both the sides held as under:

> *"13. We have carefully considered the rival submissions and also the precedent in the assessee's own case by way of the order of the Tribunal dated 25.07.2012 (supra). In the said case, the Tribunal considered the allowability of expenditure incurred by way of payment of fees of ENAM Asset Management Company Pvt. Ltd. in terms of the investment agreement dated 01.01.2005, which is precisely the issue before us also. The Tribunal referred to its earlier decision in the assessee's own case for assessment year 2004-05 vide order dated 31st May, 2011 (supra) and noticed that the issue has been decided in favour of the assessee. Thereafter, the Tribunal noted that against the decision of the Tribunal dated 31st May, 2011 (supra), Revenue preferred an appeal before the Hon'ble Supreme Court only on the issue treatment of income from the sale of shares as 'capital gain' or 'business income' and that the Revenue had not preferred any appeal against the order of the Tribunal allowing the claim of deduction of expenditure by way of Portfolio Management Fee representing payments to ENAM Asset Management Company Pvt. Ltd. while computing the income under the head 'Capital Gains'. After noticing the aforesaid the Tribunal concluded as under in para 11 of its order dated 25.07.2012 :-*
>
> > *"11. The decision of the Mumbai Bench of the Tribunal in the case of Homi K. Bhabha vs. ITO was brought to our notice by the learned DR wherein it was held that Portfolio Management Scheme fees is not deductible against capital gains. The decision of the Pune Bench of the Tribunal in the case of KRA Holding & Trading was not followed by the Mumbai Bench in the above cited decision. The Mumbai Bench following other decisions of the coordinate Benches of the Tribunal declined to follow the decision in the case of KRA Holding & Trading (supra). It is the settled proposition of law that when two view are possible on the same issue the view which is favourable to the assessee has to be followed. [CIT vs. Vegetable Products 88 ITR 192 (SC)]. Further, in the instant case the Tribunal in assessee's own case has already taken a view in favour of the assessee. Since the AO & CIT(A) have followed the order for earlier year in the case of the assessee and since the order of CIT(A) for earlier year has been reversed by the Tribunal, therefore, unless and until the decision of the Tribunal is reversed by a higher court, the same in our opinion should be followed. In this view of the matter, we respectfully following the order of the Tribunal in assessee's own case for A.Y. 2004-05 allow the claim of the Portfolio Management fees as an allowable expenditure. The ground raised by the assessee is accordingly allowed."*

Similar view has been taken by the Tribunal in the case of Nadir A Modi (supra). In the aforesaid case payment of management fee was allowed to the assessee by placing reliance on the decision in the case of KRA Holdings & Trading Investments Pvt. Ltd. (supra).

8. We observe that there are contrary decisions of the Tribunal on allowability of Management Fee u/s. 48 of the Act. It is a well settled proposition that when two views are possible, the view in favour of assessee should be preferred [Re. CIT vs. Vegetable Products Ltd., 88 ITR 192(SC)]. Thus, in the facts of the case and the decisions referred above, ground No.1 of appeal is allowed.

Disallowance u/s.14A of the Act:

9. The assessee has earned income exempt from tax u/s. 10 of the Act as under:

S.No.	Pariculars	Amount(Rs.)
1.	PPF Interest	3,227.00
2.	Dividend from Bonus Shares	20,761.40
3.	Dividend from Mutual Funds	8,52,133.40
	Total	**8,76,121.80**

No suo-moto disallowance was made by the assessee for earning of exempt income. We have examined the assessment order. A perusal of same reveals that Assessing Officer has straight away invoked the provisions of Rule 8D without recording dissatisfaction with regard to assessee's claim of no disallowance of expenditure u/s. 14A of the Act. The provisions of section 14A(2) of the Act envisage that the Assessing Officer having regard to the accounts of assessee, if not satisfied with the correctness of the claim of assessee in respect of expenditure in relation to earning exempt income, then

the Assessing Officer shall determine the amount of expenditure incurred in relation to exempt income in connection with Rule 8D(2). Where the assessee has made any suo-moto disallowance or no disallowance u/s. 14A of the Act the provisions of Rule 8D are not attracted automatically. The Assessing Officer has to record his dissatisfaction having regard to the accounts of the assessee, with reference to the correctness of the claim of assessee u/s. 14A of the Act. Though no specific proforma or the manner of recording such dissatisfaction has been prescribed, nevertheless the dissatisfaction of the Assessing Officer should be objective and emanate from his observations in the assessment order. In the instant case, we find that the Assessing Officer has simply recorded the submissions of the assessee and thereafter invoked the provisions of Rule 8D by referring to the decision in the case of Godrej & Boyce Mfg. Co. Ltd. Vs. DCIT(Supra). However, the Assessing Officer while referring to the aforesaid decision failed to take note of the manner in which dissatisfaction has to be recorded u/s. 14A of the Act, as explained by the Hon'ble High Court. The relevant extract of the observations by the Hon'ble High Court elucidating the method of recording dissatisfaction is reproduced herein below:

> *25. "……Under sub-section (2), the Assessing Officer is required to determine the amount of expenditure incurred by an assessee in relation to such income which does not form part of the total income under the Act in accordance with such method as may be prescribed. The method, having regard to the meaning of the expression 'prescribed' in section 2(33), must be prescribed by Rules made under the Act. What merits emphasis is that the jurisdiction of the Assessing Officer to determine the expenditure incurred in relation to such income which does not form part of the total income, in accordance with the prescribed method, arises if the Assessing Officer is not satisfied with the correctness of the claim of the assessee in respect of the expenditure which the assessee claims to have incurred in relation to income which does not part of the total income. Moreover, the satisfaction of the Assessing Officer has to be arrived at, having regard to the accounts of the assessee.*

Hence, sub-section (2) does not ipso facto enable the Assessing Officer to apply the method prescribed by the Rules straightaway without considering whether the claim made by the assessee in respect of the expenditure incurred in relation to income which does not form part of the total income is correct. The Assessing Officer must, in the first instance, determine whether the claim of the assessee in that regard is correct and the determination must be made having regard to the accounts of the assessee. The satisfaction of the Assessing Officer must be arrived at on an objective basis. It is only when the Assessing Officer is not satisfied with the claim of the assessee, that the Legislature directs him to follow the method that may be prescribed*. In a situation where the accounts of the assessee furnish an objective basis for the Assessing Officer to arrive at a satisfaction in regard to the correctness of the claim of the assessee of the expenditure which has been incurred in relation to income which does not form part of the total income, there would be no warrant for taking recourse to the method prescribed by the Rules. For, **it is only in the event of the Assessing Officer not being so satisfied that recourse to the prescribed method is mandated by law.** Sub-section (3) of section 14A provides for the application of sub-section (2) also to a situation where the assessee claims that no expenditure has been incurred by him in relation to income which does not form part of the total income under the Act."*

Since, the Assessing Officer has failed to record dissatisfaction as mandated u/s. 14A(2) of the Act, disallowance u/s. 14A of the Act in the instant case is unsustainable. Consequently, assessee succeeds on ground No.2 to 5 of appeal.

10. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on Tuesday the 20th day of February, 2024.

Sd/-	Sd/-
(AMARJIT SINGH)	(VIKAS AWASTHY)
लेखाकार सदस्य/ACCOUNTANT MEMBER	न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated 20/02/2024
Vm, Sr. PS(O/S)

प्रतिलिपि अग्रेषित Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. The PCIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

BY ORDER,

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(Dy./Asstt. Registrar) ITAT, Mumbai