IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH 'A' BENCH

BEFORE SHRI B.R.MITTAL(JUDICIAL MEMBER) AND
SHRI SANJAY ARORA (ACCOUNTANT MEMBER)

ITA No.8861/Mum/2010
Assessment Year: 2007-08

Apcotex Industries Limited, Post Box No.13, Plot No.3/1, MIDC Industrial Area, Taloja-410208 Dist: Raigad PA No.AAACA 3427 G	Vs.	ACIT 10(3), Mumbai
(Appellant)		(Respondent)

ITA No.870/Mum/2011
Assessment Year: 2007-08

ACIT 10(3), Mumbai	Vs.	Apcotex Industries Limited, Post Box No.13, Plot No.3/1, MIDC Industrial Area, Taloja-410208 Dist: Raigad PA No.AAACA 3427 G
(Appellant)		(Respondent)

ITA No.2959/Mum/2011: Assessment Year: 2006-07
ITA No.6527/Mum/2011: Assessment Year: 2008-09

Apcotex Industries Limited, Post Box No.13, Plot No.3/1, MIDC Industrial Area, Taloja-410208 Dist: Raigad PA No.AAACA 3427 G	Vs.	ACIT 10(3), Mumbai
(Appellant)		(Respondent)

Assessee by : Shri K Shivram
Revenue by: Shri Surinderjit Singh

Date of hearing: 28.02.2013
Date of pronouncement: 03 .04.2013

ORDER

Per B.R.Mittal, JM:

The cross appeals have been filed by assessee and revenue against orders dated 11.11.2010 of ld CIT(A)-22, Mumbai for assessment year 2007-08.

2. The assessee has filed appeals for assessment years 2006-07 and 2008-09 against order dated 22.02.2011 and 13.07.2011, respectively of Ld. CIT(A).

3. At the time of hearing, learned representative of parties submitted that most of the grounds in the appeals filed by the assessee are common and are based on similar facts, therefore, all the appeals be heard together. It was further submitted by both of parties that the appeals for assessment year 2007-08 be taken up first as learned CIT(A) has followed his order for the assessment year 2007-08 in the appeals for the assessment years 2006-07 and 2008-09. In view of above, firstly we take up appeals for assessment year 2007-08 for our consideration.

4. Grounds of appeal taken by assessee for assessment year 2007-08 are as under:

1.1 "Commissioner of Income Tax (Appeals) -22, Mumbai, erred in confirming the Capital Gain income (Long-Term as well as short-term) on sale of shares and mutual funds as business income ignoring the fact that investments were treated as "investment" only and as stock-in-trade. The Hon'ble C.I.T. (Appeals) ought to have appreciated that the capital gain income cannot be treated as business income following the CBDT circular No. 4 dated 15.06.2007.

1.2 The Hon'ble C.I.T. (Appeal) also erred is not considering the decision of the Hon'ble Bombay High Court in the case of CIT v/s Gopal Purohit.

1.3 Without prejudice to the above, the Hon'ble C.I.T. (Appeals) would have allowed portfolio management fees of Rs.88 lacs and demat charges of Rs.1.28 lacs against the income from shares 'activities, which your appellant had not claimed against capital gain income and had voluntarily disallowed the same.

> ***2.****1 The Hon'ble C.I.T.(Appeals) erred in disallowing u/sec 14A out of "interest expenditure in the ration of investment to total investment" and portfolio management fees of Rs. 88 lacs against divided Income of Rs. 18.93 lacs, ignoring the fact that no borrowed funds were utilized in investment activities and PMS fees had already been disallowed voluntarily in the return of income.*
>
> *2.2 Without prejudice to the above, the interest disallowance shall be restricted in proportion of "investment to total assets" and not in proportion of "investment to total investment".*

5. In the appeal filed by the department, the only issue is relating to disallowance u/s 14A r.w. rule 8D of Income Tax rules, 1962.

6. In respect of ground No. 1 of appeal taken by the assessee, the relevant facts are that the assessee company is stated to be engaged in the business of manufacturing activities of Synthetic Rubber & Lattices. Assessee filed the return of income on 31.10.07 declaring total income of Rs. 2,06,64,383/-. During the course of assessment proceedings, the AO observed that assessee has shown net loss before taxes at Rs. 59.83 lacs as against Rs. 177.31 lacs in the immediate previous year. AO noted that assessee has shown other income of Rs. 216.03 lacs as compared to Rs. 301.42 lacs in the immediate previous year. AO stated that if other income is excluded then assessee has actually incurred loss in its business. AO has stated that because of loss in business there is no surplus fund available. AO has stated that considering the record for the assessment years 2004-05, 2005-06 as well as for assessment years 2006-07 and 2007-08, assessee is incurring losses from the business and there is no excess surplus appearing that the assessee can utilize for investment purpose. He has stated that in A.Y. 2006-07 such transaction was treated as business transaction. AO considered the submission of the assessee and has stated that assessee has invested in the equity market through portfolio manager; namely Enam Asset Management Co. Pvt Ltd. That assessee has utilized the money for earning extra source income similar to the money invested for its normal business of manufacturing and selling of Synthetic Rubber. AO has stated that considering the volume of share transactions, holding period and number of transactions, the shares transactions carried out by the assessee can be considered as business transactions only. Accordingly AO has considered the short term

capital gains of Rs. 2,06,64,383/- and long term capital gains of Rs. 20,17,205/- as business income of the assessee and added back to the total income of the assessee. Being aggrieved, assessee filed appeal before the first appellate authority.

7. On behalf of the assessee, it was contended before Ld. CIT(A) that assessee is not engaged in the business of share trading but it invested its surplus funds through Portfolio Manager, who made investments in the market on the basis of its experience and charged portfolio fees and in the balance sheet the investment is shown as investment. Ld. CIT(A), after considering the submissions of the assessee, has held that in the case of normal share trading business the trader utilizes his own skill and experience, applies his own funds and takes decision. In the case of portfolio manager also the function is same. The funds are provided by the assessee and the broad instructions are also given for purchase and sale of shares. The motive behind the activities in both of these cases is commercial i.e. to earn profit. Ld. CIT(A) also considered the CBDT circular No. 4 of 2007 dated 15.06.2007, on which, assessee placed reliance and has stated that it clarifies that there may not be a single factor to decide the fact as to whether it is investment or stock –in-trade. CIT(A) stated that assessee has traded in 20 scrips, but the number of transaction is more than 100 during the year. He has further stated that in one single scrips, assessee had transaction a number of times i.e. shares of infosys Tech has been traded 11 times and that of Reliance Industries 12 times. The total shares purchased during the year in terms of number is 216500. Holding period is as less as 26 days as is evident from share of ICICI Bank Ltd. He has further stated that the holding period is only 14 days in the case of Titan Industries. The dividend received is only Rs. 10,58,996/- while the gain on account of trading is Rs. 2,06,64,382/-. Ld. CIT(A) after considering above facts and also the facts that the investment in shares is Rs. 10.36 crores and the assessee has taken loan of Rs. 7.15 crore, has held that AO has rightly treated the share trading activity as business of the assessee. Hence, assessee is in further appeal before the Tribunal.

8. At the time of hearing, Ld. AR referred assessee's letter dated 15.02.2012, which is an application seeking permission to file additional evidence under rule 29 of the Income Tax Appellate Tribunal Rules 1963. Ld. AR has submitted that assessee filed

various details before Ld. CIT(A) and was under the impression that he had considered them. Ld. CIT(A) did not ask for any details. Ld. AR submitted that on receipt of the order of the Ld. CIT(A), it is considered that there are certain other documents required to be considered to adjudicate the issue involve judiciously. He submitted that the said additional documents which are proposed to be filed along with this application are crucial to bring the facts on record and in the interest of justice the said documents may be considered. Ld. AR further submitted that the issue could be restored to the file of the Assessing Officer for his fresh consideration in the light of the documents proposed to be filed with this application.

9. On the other hand Ld. DR submitted that if the assessee feels that all the details have not been brought on record before the authorities below, the matter could be restored to the authorities below, to consider the complete facts and the said documents should not be considered by the Tribunal without giving opportunity to the department. In sum and substance, Ld. DR has not disputed the admission of additional documents proposed to be filed by the assessee.

10. Considering the issue involved and the nature of additional documents proposed to be filed and in the light of submissions of Ld. Representative Parties, we consider that said documents be admitted in the interest of justice. Further the said additional documents require examination at the level of the authorities below. Therefore, we admit the additional documents proposed to be filed along with application dated 15.02.2012 as these documents go to the root of the issue involved and consider it prudent to restore the matter to the file of Ld. CIT(A). Accordingly, We allow ground No.1 of appeal taken the assessee by restoring the issue to the file of Ld. CIT(A) with a direction that he will decide the issue afresh after giving due opportunity of hearing to the parties and considering such evidences as may be placed before him. Therefore, ground No.1 of the appeal is allowed for statistical purposes.

11. The ground No.2 of appeal relates to disallowance u/s 14A out of interest expenditure and the disallowance of portfolio management fees. Ld. AR submitted that said ground is also linked with the out come of the issue involved in ground No.1 of

appeal i.e. whether the profit on sale of share is to be treated as capital gain or business income. Therefore, ground No.2 of appeal should also be adjudicated afresh. Ld DR did not object to above submission of Ld. AR.

12. In view of above, ground No.2 of appeal taken by assessee is also restored to the file of Ld. CIT(A) with a direction to decide the same afresh as it is connected with issue involved in ground No.1 of appeal. Hence ground No.2 of appeal also is allowed for statistical purposes.

13. In respect of ground of appeal taken by the department for the assessment year 2007-08 by making the disallowance u/s 14A r.w rule 8D of the income Tax Rule, Ld. Representative of Parties agreed that the issue is covered against the department by the judgment of Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg Co Ltd Vs DCIT (328 ITR 81), wherein, it has been held that Rule 8D of the Income tax Rules, 1962 is applicable only prospectively i.e. from A.Y. 2008-09. The assessment year involved in the present case is 2007-08 and, therefore, Rule 8D is not applicable in the present case. Hence, ground of appeal taken by the department is rejected.

14. Now, we take up appeal for assessment year **2006-07 being I.T.A. No.2959/M/2011.**

15. Ground No.1 reads as under:

> *"Ld CIT(A) erred in disallowing a sum of Rs.37.73 lacs being repairs and maintenances expenditure when the same was not a ground involved in the appeal as the only ground involved was rejection of books of account and addition of estimated gross profit which he himself has decided in favour of your appellant by deleting the same. Ld CIT(A) made this addition without giving any opportunity of hearing to your appellant and hence without verifying the nature of the said expenditure."*

16. Facts are that the AO rejected the books of account and enhanced the profit by 0.5%. On appeal, ld CIT(A) held that rejection of books of account is not proper. However, ld CIT(A) has restricted the disallowance to Rs.23.26 lakhs considering the building expenses to be capital in nature. Hence, assessee is in appeal before the Tribunal.

17. Before us, ld A.R. filed additional documents giving details of the said expenses in page Nos. 45 to 115 of the PB. He submitted that ld CIT(A) did not give any opportunity to the assessee while considering the said expenditure as capital. He submitted that AO did not ask for any details at the time of remand proceedings and ld CIT(A) also did not ask for any details. He submitted that the matter could be restored to the file of AO to decide the issue afresh after considering additional evidences. He submitted that the details could not be furnished before ld CIT(A) as the issue whether expenditure is revenue or capital was not before him and the only issue was rejection of books of account.

18. Ld D.R. submitted that AO in his remand report stated that the expenditure is not revenue and, therefore, assessee should have filed details before ld CIT(A). He accordingly, opposed the admission of additional documents.

19. On considering the submissions of the Ld. Representatives and facts of the case, we in the interest of justice, restore the issue to the file of Assessing Officer to decide the same afresh after considering the additional evidences, as may be filed before him. Hence, Ground No.1 is allowed for statistical purposes.

20. In Ground No.2, assessee has disputed the confirmation of capital gain income on sale of shares and mutual funds as business income.

21. This issue is similar to Ground No.1 of appeal taken by assessee in assessment year 2007-08. The Ld. Representatives of both parities submitted that whatever view is taken in A.Y. 2007-08, the same will apply ipso facto to this year on the issue involved. Since, we have restored the issue to the file of ld CIT(A) in assessment year 2007-08 to redecide the issue afresh and, accordingly, we restore Ground No.2 of appeal for assessment year 2006-07 to the file of ld CIT(A) to decide the same afresh. Hence, Ground No.2 is allowed for statistical purposes.

22. Ground No.3 relates to disallowance u/s.14A. This ground is consequential to Ground No.2 . Hence, this issue is also restored to the file of ld CIT(A) to decide the same afresh.

23. Now we take up appeal filed by assessee for assessment **year 2008-09 being I.T.A. No.6527/M/2011.**

24. Grounds of appeal are as under:

"1.1 The Commissioner of Income tax (Appeals) erred in confirming the treatment of Capital Gain Income (Short —term and Long Term Capital Gain) on sale of investment worth Rs.4,27,61,139/- as business income ignoring the fact that the appellant is engaged in the business of manufacturing which is the main object as per the Memorandum of Association and is not engaged in share trading business.

1.2 The said C.I.T. (Appeals) erred in not considering the CBDT circular No.4 dated 15/06/2007 and the fact that the investment were shown 'under the head investments' in the Balance sheet.

1.3 Without prejudice, the said CIT (A) erred in not allowing the portfolio management fees (PMS Fees) and Demat charges incurred of Rs.1,60,18,097/- which was voluntarily disallowed against capital gain income when the said capital income is assessed as business income.

2. The said C.I.T. (Appeals) erred in confirming the addition of Rs.95,9841- being prior period item ignoring the fact that the same is merely a rectification entry of earlier year and was never claimed as revenue expenditure and hence cannot be taxed as revenue income.

3. The Id. C.I.T. (Appeals) erred in directing the A.O. to rectify the application u/s 154 when the claim for Bad-debt is legitimate following the Hon'ble Supreme Court decision in the case of T.R.F. Ltd. v/s CIT 323 ITR 397 of PMS fees and demat charges as direct expenses u/r 8 D (a).

4. The Id. C.I.T. (Appeals) erred in confirming the addition of PMS fees and demat charges Rs.1,60,18,0971- (PMS Fees Rs.1,58,55,429 + Demat charges Rs.1,62,668/-) as direct expenses u/r 8 D (a) r.w. sec. 14 A ignoring the fact that the said

expenses are directly incurred for earning of capital gain and not for earning dividend income.

5. Short-credit for TDS claimed by Rs.22,251/-
The ld CIT(A) erred in not giving credit for TDS by Rs.22,251 out of total TDS claimed of Rs.4,39,586/- when all the details are not received.

6. The said ld CIT (A) erred in not deleting the interest charged u/s.234A by Rs.3,02,207/- ignoring the fact that e-return of income was filed before the date i.e. on 27.9.2008."

25. Ground Nos.1 and 4 are similar to Ground No.1 and 2 of appeal for assessment year 2007-08. We have restored the issue to the file of ld CIT(A) for assessment year 2007-08 and, therefore, in line with our decision, we also restore this issue to the file of ld CIT(A) with the same direction. Hence, Ground Nos.1 and 4 are allowed for statistical purposes.

26. Ground No.2 relates to prior period expenses. During the assessment proceedings, the Assessing Officer noticed that an amount of Rs.2,77,298/- is credited to the profit and loss account being prior period income after computing the profit before tax. He noted that the prior period income of Rs.1,81,315/- was added to the net profit. Hence, he added back the difference of Rs.95,984 (Rs.2,77,298 – Rs.1,81,315). On appeal, ld CIT(A) upheld the action of Assessing Officer. Hence, this appeal by assessee.

27. Before us, ld A.R. submitted that no further details could be furnished. Hence, we see no reason to interference with the order of ld CIT(A) and, accordingly, uphold his order on this issue. Ground No.2 is dismissed.

28. Apropos Ground No.3, we observe that ld CIT(A) has restored the matter to the file of AO to dispose the petition u/s.154 pending before him. Hence, there is no grievance by the assessee. Accordingly, we reject this ground of appeal taken by assessee.

29. Ground No.5 was not pressed for. Hence, same is rejected as not pressed.

30. Ground No.6 relates to changing of interest and is consequential, Hence it requires no adjudication.

31. In the result, appeals filed by assessee for assessment years 2007-08 & 2006-07 are allowed for statistical purposes and whereas appeal for assessment year 2008-09 is allowed in part. The appeal filed by department for A.Y. 2007-08 is dismissed.

Order pronounced in the open court on 03rd April, 2013

Sd/- (SANJAY ARORA) Accountant Member	Sd/- (B.R. MITTAL) Judicial Member

Mumbai, Dated 03rd April, 2013
Parida

Copy to:
1. The appellant
2. The respondent
3. Commissioner of Income Tax (Appeals),22, Mumbai
4. Commissioner of Income Tax, 10 , Mumbai
5. Departmental Representative, Bench 'A' Mumbai

//TRUE COPY// BY ORDER

ASSTT. REGISTRAR, ITAT, MUMBAI

		Date	Initials	
1.	Draft dictated on	25.1.13		SPS
2.	Draft placed before author	26.03.13		SPS
3.	Draft proposed & placed before the Second Member	01.04.13		JM
4.	Draft discussed/approved by Second Member			AM

5.	Approved Draft comes to the Sr. PS			SPS
6.	Kept for pronouncement on			SPS
7.	File sent to the Bench Clerk			SPS
8.	Date on which file goes to the Head Clerk			
9.	Date on which file goes to A.R.			
10.	Date of dispatch of order			