

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

BEFORE SHRI G.S.PANNU, ACCOUNTANT MEMBER
AND SHRI JOGINDER SINGH, JUDICIAL MEMBER

ITA No. 7999/MUM/2010
(Assessment Year : 2006-07)

Late Shri Lalchand S. Rohra,
By Legal Heir : Mrs. Beena Sachev,
101-A, Embassy Apartments,
46, Nepean Sea Road,
Mumbai 400 026
PAN:AASPR 0251L

... Appellant

Vs.

The Addl. CIT 14(2),
Mumbai.

.... Respondent

Appellant by	: Shri Vimal Punmiya
Respondent by	: Shri Yogesh Kamat

Date of hearing	:	08/02/2016
Date of pronouncement	:	29/04/2016

ORDER

PER G.S. PANNU,AM:

The captioned appeal filed by the assessee pertaining to the A.Y. 2006-07 is directed against an order passed by Ld. CIT(A)-25, Mumbai dated 01/10/2010, which in turn arises out of an order passed by Assessing Officer under section 143(3) of the Income Tax Act, 1961 (in short 'the Act') dated 29/12/2008.

2. In this appeal Revenue has raised the following Grounds of appeal.

1. The Ld. Commissioner of Income Tax (A) erred in confirming and treating Rs.38, 96,224/- as Income from Business & profession as against short term capital gain claimed by the assessee.

2. The Ld. Commissioner of Income Tax (A) erred in confirming and treating Rs. 27,44,159/- as Income from business & profession as against long term capital gains claimed exempt under section 10(38) of the Income Tax Act, 1961 by the assessee.

3. The Ld. Commissioner of Income Tax (A) erred in confirming the disallowance of Rs.6,24,577/- under Section 14A of the Income Tax Act, 1961 alleging that the said expenses debited to profit and loss account are pertaining to exempt income.

4. The Ld. Commissioner of Income Tax (A) erred in confirming the charging interest under section 234B & 234C of Income Tax Act, 1961.

5. The Ld. Commissioner of Income Tax (A) erred in invoking the provisions of Section 271(1)(c) of the Income Tax Act, 1961.

3. In so far as the Grounds of appeal No.1 & 2 are concerned, they relate to the assessability of the profit earned by the assessee on sale and purchase of shares and securities. Depending on the period of holding, assessee had declared the gain on sale of shares and mutual funds as short term capital gain or long term capital gain. Accordingly, Rs.38,96,224/- was declared as short term capital gain and Rs.27,44,159/- as long term capital gain, which was claimed exempt under section 10(38) of the Act. The Assessing Officer, however, treated the activity of sale and purchase of shares and mutual funds as a trading activity and thus, treated the aforesaid gains as an income assessable under the head 'business income'. Apart from other arguments set-up by the Assessing Officer, a pertinent point, which has been noted is that even the assessment records for the earlier years

reveal that voluminous trading in shares and mutual funds has been undertaken by the assessee, and, thus there was regularity in carrying out such an activity. The stand of the Assessing Officer that such income was assessable as business income has also been further affirmed by the CIT(Appeals) against which the assessee is in appeal before us by way of Grounds of appeal No.1 & 2, hereinabove.

4. On both the counts, it was a common point between the parties that similar stand of the Assessing Officer came up for consideration before the Tribunal in assessee's own case for assessment year 2005-06 and vide order in ITA NO.422/Mum/2011 Dated 12/06/2013, the stand of the assessee has been upheld. In this context, we may reproduce hereinafter the relevant portion of the order of the Tribunal dated 12/06/2013(supra), which reads as under:-

" 8. We observe that the dispute is mainly in respect of taxing the short term capital gain shown by the assessee between 1.10.2004 to 31.3.2005 of Rs.6,35,609.19 as short term capital gain prior to 1.10.2004, was assessable @ 30%, the same rate at which business income was to be assessed. On perusal of balance sheet at page 4 of PB as well as profit and loss account placed at page 5 of PB, we observe that assessee has specifically stated investment in shares at Rs.55,94,573 and has shown in the current assets the stock in trade of Mutual Fund. However, assessee has also stated specifically in the profit and loss account, details of long term capital gain, short term capital gain and speculative dealings in shares, besides showing interest and dividend income by the assessee in the assessment year under consideration. Further, it is also observed that assessee is maintaining separate details in respect of shares, held by the assessee under the head 'stock-in-trade' and shares held under the head 'investment'. Therefore, we find substance in the submission of Id A.R. that assessee is maintaining separate portfolio of shares held as investment and shares held as stock in trade. The above facts have not been controverted by the authorities below. We observe that authorities below have not accepted the profit shown by the assessee as short term capital gain mainly for the reason that in respect of some of the shares, the period of holding was small and also considering number of scrips, in which transaction took place in the assessment year under consideration. However, on perusal of said statement, placed at pages 24-25 of PB, we observe that there are not repetitive transactions in the same scrips. The department has not disputed the fact that assessee has not used any borrowed funds for the purpose of purchase of shares and same is also fortified on perusal of

profit and loss account, that no interest has been claimed towards expenses. The ITAT Mumbai has held in the case of Janak S Rangwala vs ACIT, 11 SOT 627 that mere volume of transaction does not mean that assessee is a trader. The intention with which purchase has been made has to be seen. It is held that if in earlier year, the department has treated the assessee as an 'investor', it cannot take a different view in subsequent year. In the case before us, it also observed that in assessment year 2004-05, assessee has shown short term capital gain as well as long term capital gain and department while making the assessment u/s.143(3) of the Act vide order dated 11.8.2006, copy placed on record, accepted the capital gain shown by the assessee. In the case of Gopal Purohit vs JCIT, 29 SOT 117(Mum), ITAT has held that most crucial source of gathering intention of assessee as regards nature of transaction is the accounts maintained by the assessee. It is further held that delivery based transactions should be treated as investment transactions. The said finding of 7 the Tribunal has been upheld by Hon'ble Bombay High Court in the above case reported at 228 CTR 582(Bom), and the appeal filed by the department against said decision of Hon'ble Bombay High Court was also rejected by Hon'ble Supreme Court vide order dated 15.11.2010. Further, in the case of DCIT vs. SMK Sahres & Stock Broking Pvt Ltd., (I.T.A. No.799/M/2009) order dated 24.11.2010, ITAT Mumbai has held that mere volume of transactions is not the sole criteria to hold the assessee to be a trader. The manner of showing shares in accounts is relevant We observe that in the case before us, department has not accepted the profits shown by the assessee as capital gain, merely on the ground of volume of transactions but has not disputed the manner of showing the shares in its account under the head 'investment'. We are of the considered view that above decisions of ITAT squarely apply to the case of the assessee. Considering the facts of the assessee, we hold that the short term capital gain aggregating to Rs.10,16,274/- shown by the assessee , be assessed under the head 'short term capital gain' instead of 'business income'. Hence, Ground No.1 of appeal is allowed."

5. In view of the above precedent, the stand of the lower authorities in treating the assessee as a trader in shares is unsustainable. Pertinently, in the instant assessment order, the Assessing Officer has considered the 'assessment records for the earlier years' as well to say that the assessee is not an investor in shares. Now, if in the earlier period, the assessee has been held by the Tribunal to be an investor in shares, consequently, in the instant year also such a finding is inevitable. The Tribunal in its order dated 12/06/2013 (supra) has noticed that in assessment year 2004-05 the department has itself treated the assessee as an investor in shares while making the

assessment under section 143(3) of the Act. Thus, having regard to the history of the case, the action of the income-tax authorities in assessing the gain on sale and purchase of shares and mutual funds as business income is untenable. We hold so. Thus, Grounds of appeal No.1 & 2 raised by the assessee stand allowed.

6. In Ground of appeal No.3, the issue relates to disallowance of Rs.6,24,577/- by application of section 14A of the Act on the ground that such expenses are relatable to incomes which are exempt from tax. The Assessing Officer noted that the assessee had declared incomes on account of dividend of Rs.2,56,182/- and interest of Rs.4,76,848/-, which was exempt from tax. However, assessee claimed that no expenditure was incurred for earning such exempt income and hence no disallowance was made under section 14A of the Act. The Assessing Officer however disagreed with the assessee and computed an expenditure of Rs.6,24,577/- as relatable to earning of such exempt income by applying the provisions of 14A r.w. Rule -8D of the Income Tax Rules,1962(in short 'the Rules'). The said disallowance has also been affirmed by the CIT(Appeals), against which the assessee is in appeal before us.

7. Before us, the only point put-forth by the assessee is that the application of rule 8D of the Rules in order to compute the disallowance under section 14A of the Act is not merited because the said Rule is not applicable for the year under consideration as held by the Hon'ble Bombay High Court in the case of M/s. Godrej & Boyce Mfg. Company Ltd. Vs. DCIT,328 ITR 81(Bom). Apart therefrom, the Ld. Representative

for the assessee submitted that any disallowance based on an estimate of 1 to 3% of the total income would be in order.

8. On the other hand, Ld. Departmental Representative has not controverted the applicability of the judgment of Hon'ble Bombay High Court in the case of M/s. Godrej & Boyce Mfg. Company Ltd.(supra), but contended that the disallowance under section 14A was required to be made in the absence of any suo-motu disallowance made by the assessee.

9. We have carefully considered the rival submissions. Quite clearly, the provisions of Rule 8D of the Rules are not applicable for the assessment year under consideration following the ratio of the judgment of Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. Company Ltd.(supra). Therefore, the disallowance of Rs.6,24,577/- worked out by the Assessing Officer is not appropriate. So however, it also emerges from the record that apart from asserting that no amount debited to the P&L Account pertains to the exempt income, assessee has not lead any further material or evidence thereof. Be that as it may, in our view, it would be appropriate that disallowance of 5% of the exempt income i.e. 5% of Rs.7,33,030/- be considered as a reasonable disallowance under section 14A of the Act in the present case. Therefore, we set-aside the order of the CIT(Appeals) and direct the Assessing Officer to restrict the disallowance under section 14A at 5% of the exempt income. Thus, on this aspect assessee succeeds.

10. The last Ground of appeal of the assessee is in respect of charging of interest under section 234B&234C of the Act which are consequential in nature.

11. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 29th April , 2016.

Sd/-
(JOGINDER SINGH)
JUDICIAL MEMBER
Mumbai, Dated 29 /04/2016

Sd/-
(G.S. PANNU)
ACCOUNTANT MEMBER

Vm, Sr. PS

Copy of the Order forwarded to :

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai