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IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCHES: "A" NEW DELHI

BEFORE SHRI J.SUDHAKAR REDDY, A.M.  
AND SHRI A.D. JAIN, JM

ITA No: 5514/Del/2011  
Assessment Year : - 2008-09

ACIT, Circle 2(1)  
Room 1398 D  
C.R.bdlg. New Delhi

vs. B.Jain Exports P.Ltd.  
1921/10, Chuna Mandi  
Paharganj  
New Delhi

PAN: AAACB 0250 A

(Appellant)

(Respondent)

Appellant by : Sh.Bhim Singh, Sr.D.R.

Respondent by : Shri Ved Jain, C.A.

**ORDER**

**PER J.SUDHAKAR REDDY, ACCOUNTANT MEMBER**

This is an appeal filed by the Revenue and is directed against the order of the Ld.CIT(A)-V, New Delhi dated 12.9.2011 pertaining to A.Y. 2008-09.

2. Facts in brief:- The facts of the case as brought out at para 2 of the order of the Ld.CIT(A) is extracted for ready reference.

"2. The appellant is engaged in export of handicraft and shawl etc. and local sale of software. The assessee has income from business, capital gains and income from other sources during the AY 2008-09 and the same sources of income as were in earlier years. The return was processed u/s 143(1) dt. 11.11.2009 at an income of Rs.89,23,610/- as against returned income of Rs.28,055,40/-. Rectification application pointing out mistake apparent from record is still pending. Thereafter, assessment u/s 143(3) was compelled after making the following disallowances:

- a) Disallowance u/s 14A r.w.Rule 8D of Rs.8,48,290/-;
- b) ALV of house property of Rs.16,80,000/-

c) *Short term capital gain treated as business income of Rs.61,81,062/-.*"

3. On appeal the Ld.CIT(A) granted relief to the assessee.

4. Aggrieved, the Revenue is in appeal before us on the following grounds.

"1. (a) *The Ld.CIT(A) has erred in restricting the disallowance under Rule 8D of the IT Rules to Rs.2 lacs as against the disallowance of Rs.8,48,280/- made by the AO on account of expenditure in relation to the income that does not form a part of the total income;*

*(b) The Ld.CIT(A) inter alia erred in not upholding at least the disallowance of Rs.6,32,896/- which is any way independently disallowable under Rule 8D(2)(iii).*

2. *The Ld.CIT(A) has erred in holding that the income of Rs.61,18,062/- on purchase/sale of units/shares was to be assessed as short term capital gains as against the business income assessed by the AO.*

3. *The appellant craves leave for reserving the right to amend, modify, alter, add or forego any grounds of appeal at any time before or during the hearing of this appeal."*

5. We have heard Shri Bhim Singh, Ld.Sr.D.R. on behalf of the Revenue and Shri Ved Jain, the Ld.Counsel for the assessee.

6. On a careful consideration of the facts and circumstances of the case and on a perusal of the papers on record, as well as the orders of the authorities below, and case laws cited, we hold as follows.

7. On ground no. 1 and 2 the Ld.D.R. submitted that the issue should be set aside to the file of the AO for fresh adjudication. Mr.Ved Jain, the Ld.Counsel for the assessee strongly opposed these contentions. He submitted that application of Rule 8'D' is not automatic. The Ld.AO proceeded to apply Rule 8'D' without giving any finding with regard to the correctness or otherwise of the claim of the assessee that no borrowed funds were used for the



investment in shares and that the investment in shares were out of own funds. In earlier AYs, the same was accepted in assessment u/s 143(3) of the Act. The Hon'ble Delhi High Court in the case of Maxopp Investments Ltd. Vs CIT reported in 347 ITR 272 (Del.) held as follows.

The High Court had to consider two issues: (a) whether interest paid on funds borrowed to acquire "trading shares" is hit by s. 14A given that the profits there from are assessable to tax as "business profits" and the dividend is incidental and (b) whether Rule 8D has retrospective operation. HELD by the Court:

(i) The argument that if the dominant and main objective of the expenditure was not the earning of 'exempt' income then, the expenditure cannot be disallowed u/s 14A is not acceptable. The expression "in relation to" cannot be given a narrow meaning and simply means "in connection with" or "pertaining to". If the expenditure has a relation or connection with or pertains to exempt income, it cannot be allowed as a deduction even if it otherwise qualifies under the other provisions of the Act;

(ii) The expression "expenditure incurred" in s. 14A refers to actual expenditure and not to some imagined expenditure. If no expenditure is incurred in relation to the exempt income, no disallowance can be made u/s 14A (Hero Cycles Ltd 323 ITR 518 referred).

(iii) The AO cannot proceed to determine the amount of expenditure incurred in relation to exempt income without recording a finding that he is not satisfied with the correctness of the claim of the assessee. This is a condition precedent. While rejecting the claim of the assessee with regard to the expenditure or no expenditure in relation to exempt income, the AO will have to indicate cogent reasons for the same;

(iv) Rule 8D comes into play only when the AO records a finding that he is not satisfied with the assessee's method. Though s. 14A(2) & (3) were inserted w.e.f. 1.4.1962, Rule 8D was inserted on 24.03.2008. Accordingly, Rule 8D would operate prospectively. (Godrej and Boyce Mfg. Co. Ltd 328 ITR 81 (Bom) followed);

(v) For periods prior to Rule 8D, the AO will have to adopt a reasonable method on the basis of objective criteria to determine the expenditure. However, here also, he will have to show why he is not satisfied with the correctness of the assessee's claim (argument that Rule 8D exceeds the mandate of s. 14A left open).

8. In the present case the assessee has not disallowed any amount u/s 14A. The argument of the assessee is that there is no expenditure incurred for

earning the said exempt income. The AO disallowed 5% of the dividend income without giving any reason as to why the assessee's claim was wrong. The Ld.CIT(A) restricted the disallowance of Rs.2 lakhs. on an adhoc basis.

On this factual matrix we are unable to agree with the plea of the Ld.D.R. that



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There is no satisfaction recorded by the A.O. that the factual claim made by the assessee that no expenditure is incurred is wrong. In the result the issue should be set aside to the AO for fresh adjudication. In the result this ground of Revenue is dismissed.

9. Coming to ground no.2 which is on the issue whether the income from the sale of shares is to be assessed as capital gain or as business income, we find that the Ld.CIT(A) has at para 4.7 of his order held as follows.

"4.7. I have carefully considered facts of the case, the reasoning given by the AO to treat the gains from share trading under the head 'income from business and profession' in the assessment order as well as the contentions raised in the submission of the appellant. I have also perused the chart showing details like the date of investment of opening balance of scripts (as on 1.4.07), date of purchase, sale of scripts during the year with script wise dividends received along with the period of holding. From the chart, it is clear that the principles derived by the AO from the various judicial rulings and CBDT circulars are totally misplaced and are not applicable to the facts of the appellant's case. The AO has admitted that the stocks has been reflected as investment in the books of accounts. This is an accepted fact not disputed by AO that the appellant has shown the stocks in the books of accounts as investment and the appellant has also being declaring income under the head short term capital gains in earlier years which have been accepted as such in assessments completed u/s 143(3). Another related issue from the accounting point of view is how the shares have been valued by the assessee in his books of accounts. It is seen that the assessee has always valued the shares at cost in the balance sheet, which clearly indicates that the stocks have been treated as investment only since their acquisition and this method has been consistently followed and assessed as such u/s 143(3) in the earlier years. Therefore following the rule of consistency too, the appellant deserves to succeed, even though the principle of res judicata does not strictly apply to income tax proceedings. Yet, unless there is a change in fact or law, the position that stands accepted in earlier proceedings should hold good. The assessee has not taken any benefit of diminution in the value of shares and securities by way of valuing the stock at cost or market value since the shares had not been held as stock in trade. Therefore, the allegation that the company is engaged in the business of trading in shares is not supported by facts."

10. The Ld.A.R. could not controvert the factual findings of the Ld.CIT(A) that on perusal of the chart showing details of purchase, sale of shares, opening balances etc. did not demonstrate that the assessee is a trader. On

perusal of the statement filed before us it demonstrates that most of the stocks were held for period of three months to six months or in some cases more and it was only in certain instances the stocks were held for a period of 3 days to 9 days. There were no intra trade tradings. Admittedly the stocks have been held for a considerable period by the assessee. The stocks were reflected as investments in the books of accounts. The assessee is engaged in the business of export of handloom items, <sup>Shares</sup> shares during the year under appeal. All investments were made out of surplus funds in mutual funds and shares. In the PYs the assessee has shown profits from sale of shares/mutual funds as short term capital gain and long term capital gain. The treatment given by her ~~assessee~~ was accepted by the AO for earlier years in assessments made u/s 143(3) of the Act.

11. The Hon'ble P&H High Court in the case of Girish Madan 260 ITR 417 (P&H) held as follows

*" We have heard counsel for the appellant and perused the orders passed by the Appellate Tribunal and also the order of the Commissioner of Income-tax (Appeals) and are of the view that no substantial question of law arises in this case for this court to entertain the appeal. The Commissioner of Income-tax (Appeals) has discussed the entire issue in detail taking note of the amendments made by the Finance Act, 1994. He also considered the law laid down by the apex court in CIT v. H. Holck Larsen [1986] 160 ITR 67 and followed the same. It is not in dispute that the Department in the previous assessment years had treated such transactions in the hands of the assessee as his income from capital gains and did not dispute that the income derived from the sale of shares was business income. The findings in the previous years, no doubt, do not operate as resjudicata but that does not mean that in every subsequent year it is open to the Assessing Officer to take a different view in the matter. Of course, he can take a different view if some fresh material is placed before him. The*

Commissioner of Income-tax (Appeals) and also the Tribunal have found that no fresh material was placed before the Assessing Officer. On a consideration of the entire material on the record, the authorities below have found that the shares held by the assessee were by way of investment only and that he was not dealing with them. Learned senior counsel appearing for the Department could not point out any legal or factual infirmity in the order of the Tribunal or in the order of the Commissioner of Income-tax (Appeals). The totality of all facts has been examined and correct principles have been applied by the Commissioner of Income-tax (Appeals) in coming to the conclusion that the assessee was only investing in shares. There has thus been no misapplication of any principle of law so as to warrant interference by this court under section 260A of the Act. Consequently, the appeal is dismissed."

12. On this factual matrix, as the average period of holding of the assessee is six months, and as the assessee has not borrowed any funds for investment and as the assessee has received substantial dividend from these investments and as these were classified as investments in the books of accounts on the very same set of facts for the AYs 2004-05/2005-06 and 2006-07 the Revenue has accepted the income under the head 'capital gain', we find no reason to interfere in the well reasoned order of the Ld.CIT(A).

13. In the result the appeal of the Revenue is dismissed.

Order pronounced in the Open Court on ... 24<sup>th</sup> May, 2013.

(A.D. JAIN)  
JUDICIAL MEMBER

(J.SUDHAKAR REDDY)\*  
ACCOUNTANT MEMBER

Dated: the 24<sup>th</sup> May, 2013

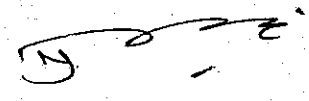
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Copy of the Order forwarded to:

- 1. Appellant;
- 2. Respondent;
- 3. CIT;
- 4. CIT(A);
- 5. DR;
- 6. Guard File

By Order



Dy. Registrar

सहायक रजिस्ट्रार,  
 Assistant Registrar,  
 आयकर अपील संस्थान  
 Income-tax Appellate Tribunal  
 दिल्ली (बी. १६ फ्लोर)  
 Delhi Branch, New Delhi

