

IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH : 'E' : NEW DELHI

BEFORE SHRI G.D. AGRAWAL, PRESIDENT

AND

SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER

ITA No.1331/Del /2012

Assessment Year : 2008-09

M/s Nice Bombay
Transport (P) Ltd.
C-4/5, Lower Ground
Floor, Safdarjung
Development Area,
New Delhi

Vs. ACIT, (OSD),
CIT-V,
New Delhi
(Appellant) (Respondent)

Appellant by : Ms. Jyoti Narula, CA
Respondent by: Ms. Rashmita Jha, Sr. DR

ORDER

PER SHRI K. Narasimha Chary, Judicial Member:

This is an appeal by the Assessee challenging the Order dated 20.10.2011 passed by the Ld. Commissioner of Income Tax (Appeals)-XVI, New Delhi (in Short "Ld. CIT (A)") wherein the following grounds have been raised.

(i) That the revenue has erred in law and on facts in disallowing expenses u/s. 14A of the Income Tax Act, 1961.

(ii) That the revenue has erred in law and on facts in disallowing credit of Minimum Alternate Tax under section 115JA of the Income Tax Act, 1961.

2. Brief facts of the case are that the assessee is engaged in business of trading of share and units of mutual funds. For the assessment year 2008-09 it filed return of income on 13.9.2008 declaring total income of Rs. 4,64,90,152/- . Ld. AO computed the total income

at Rs. 4,85,55,945/- by adding the sum of Rs. 17,65,795/- u/s. 14 A of the Act and Rs. 3 lacs by way of disallowance u/s. 80G.

Further, the Ld. AO allowed the MAT of Rs. 2273025/- and disallowed a sum of Rs. 1098399 stating that it is the excess MAT credit, after excluding the surcharge and cess.

3. Assessee preferred the appeal before the Ld. CIT (A), which was dismissed by the Ld. CIT (A) by way of impugned order. Hence, the assessee is in appeal before us challenging the addition of Rs. 1765795/- and disallowance of MAT credit of Rs. 1098399/-.

4. It is the submission on behalf of the assessee that the assessee company is engaged in the business of trading in shares and these shares as part of its stock in trade and not an investment. It was further submitted that in its balance sheet also the assessee company has shown the shares as stock in trade and the primary objective of investing in shares by the assessee company was to sell them at profit. It was further submitted that dividend income was only incidentally earned by the assessee company and Interest was paid by the assessee company on funds borrowed by it for acquiring its stock in trade and had no direct correlation with the divided income earned by it. The fund were not borrowed for making an investment for the purpose of earning dividend income and the assessee company has not incurred any expense which was directly attributable to the dividend income earned during the year relevant to the assessment year 2008-09. Consequently there was no disallowance under Section 14A of the Income Tax Act, 1961 read with Rule 8D as set forth below. It was further submitted that Ld. AO cannot introduce a fiction in Rule 8D of the Income Tax Rules, 1962, (for short 'the Rules') whereby he treats the stock in trade of the assessee company as an investment and unjustly computed the disallowance under section 14A. Notwithstanding this fact, the assessee company made disallowance on an adhoc basis taking ratio of exempt income over the total income.

5. Per contra, Ld. DR heavily relied upon the orders of the authorities below.

6. We have carefully considered the submissions and perused the records. There is no denial of the assertions by the assessee that the assessee is engaged in the business of trading in share and all the shares are held by the assessee company as part of its stock-in-trade and not as an investment as is evidenced by the balance sheet of the company. However, Ld. AO recorded that a profit making company pays dividend to its shareholders who have invested some money to its shares, whether the Shareholder is a trader of share or not. Ld. AO further noted that the assessee company has purchased units from the mutual funds under the Dividend Reinvestment Plan and earned day to day dividend in the shape of units and value of the purchase account had increased by such units and the motive of the assessee company is clear to earn the dividend income. Ld. AO further observed that for a trader of shares, two types of gains are available, simultaneously. Firstly, earning profit from the settling of shares at higher prices from its cost price and secondly is the dividend income and without making investments, the assessee could not have earned dividend income.

7. Thus, as per Ld. AO the investments and dividend are integral part of financial transactions, and they are inseparable. One cannot claim that investment in shares is made only for earning trading benefits or for having dividend income only, because both the gains are existing simultaneously. Ld. AO further noted that in the same way, the expenditure incurred by way of interest on the money taken on loan for investment/purchase of shares cannot be segregated as the expenditure incurred exclusively for investment/purchase of shares. Actually, the expenditure has been incurred for having both the benefits.

Thus, it is amply clear that the expenditure incurred by way of payment of interest has direct link with the dividend income and hence, disallowance as per section 14A of the I.T. Act.

8. Assessee placed reliance on the decision reported in the case of Vora Financial Services (P.) Ltd. v. Asstt. CIT, Mumbai by the ITAT, Mumbai Bench [2018] 96 taxmann.com 88/171 ITD 646 wherein, it was held that where a major portion of dividend income had been received as shares held as stock-in-trade, it cannot be appropriate to apply the provisions of Rule 8D. It is further argued by the Ld. Authorized Representative that whatever the expenses that are debited to the profit and loss account are the business expenses relating to trading of the shares and not additional expense whatsoever made.

9. Further reliance is placed on the decision of the Hon'ble Kerala High Court in the case of CIT v. Smt. Leena Ramachandran [2011] 10 taxmann.com 109/199 Taxman 122/339 ITR 296 for the principle that the assessee would be entitled to deduction of interest under section 36(1)(iii) of the Act on borrowed funds utilized for the acquisition of shares, when the shares held as stock-in-trade which arise if the assessee is engaged in the trading of shares.

10. In fact, this question had fallen for consideration in the case of Maxopp Investment Ltd. v. CIT [2018] 91 taxmann.com 154/254 Taxman 325/402 ITR 640 (SC), wherein the Hon'ble Apex Court considered two cases wherein the question of apportionment of expenditure had arisen and predominant intent of investment in shares was pleaded, though an different facts, on the ground that the objective of investing in shares was not to the dividend income, but to either retain controlling interest over the company in which the investment was made or to earn the profit from trading in shares. The question was whether the disallowance under section 14 A of the Act could be invoked in the cases where exempt income was earned from shares held as "trading assets" or "stock in trade". The first case relates to Maxopp investment Ltd and the second case relates to the case of State Bank of Patiala. In the case of Maxopp investment Ltd the assessee company is in the business of finance, investment and was dealing in shares and securities; that they held the shares and securities, partly as investments on the "capital account" and partly as "trading assets" for the purpose of acquiring and retaining control over its group companies, primarily Max India Ltd.; and that the profits resulting on the sale of shares held as trading assets were duly offered to tax as business income of the

assessee. In the case of State Bank of Patiala the assessee the exempt income in the form of dividend was earned by the bank from securities held by an stock in trade.

11. The Hon'ble Supreme Court was considering the question that has arisen under varied circumstances where the shares/stocks were purchased of a company for the purpose of gaining control over the said company or as "stock in trade", though incidentally income is also generated in the form of dividends as well.

12. It was argued before the Hon'ble Apex Court that though incidentally income was also generated in the form of dividends, the dominant intention for purchasing the shares was not to earn the dividend income but to acquire and retain the controlling the business in the company in which shares were invested, or for the purpose of trading in the shares as business activity.

13. After considering the entire case law on this aspect in the light of the peculiar facts involved in both the matters, the Hon'ble Apex Court vide paragraph No. 39 and 40 held as follows:

(39) In those cases, where shares are held as stock-in-trade, the main purpose is to trade in those shares and earn profits therefrom. However, we are not concerned with those profits which would naturally be treated as 'income' under the head 'profits and gains from business and profession'. What happens is that, in the process, when the shares are held as 'stock-in-trade', certain dividend is also earned, though incidentally, which is also an income. However, by virtue of Section 10 (34) of the Act, this dividend income is not to be included in the total income and is exempt from tax.

This triggers the applicability of Section 14A of the Act which is based on the theory of apportionment of expenditure between taxable and non-taxable income as held in Walfort Share and Stock Brokers P Ltd. case. Therefore, to that extent, depending upon the facts of each case, the expenditure incurred in acquiring those shares will have to be apportioned.

(40) We note from the facts in the State Bank of Patiala cases that the AO, while passing the assessment order, had already restricted the disallowance to the amount which was claimed as exempt income by applying the formula contained in Rule 8D of the Rules and holding that section 14A of the Act would be applicable. In spite of this exercise of apportionment of expenditure carried out by the AO, CIT (A) disallowed the entire deduction of expenditure. That view of the CIT (A) was clearly untenable and rightly set aside by the ITAT. Therefore, on facts, the Punjab and Haryana High Court has arrived at a correct conclusion by affirming the view of the ITAT, though we are not subscribing to the theory of dominant intention applied by the High Court. It is to be kept in mind that in those cases where shares are held as 'stock-in-trade', it becomes a business activity of the assessee to deal in those shares as a business proposition. Whether dividend is earned or not becomes immaterial. In fact, it would be a quirk of fate that when the investee company declared dividend, those shares are held by the assessee, though the assessee has to ultimately trade those shares by selling them to earn profits. The situation here is,

therefore, different from the case like Maxopp Investment Ltd. where the assessee would continue to hold those shares as it wants to retain control over the investee company. In that case, whenever dividend is declared by the investee company that would necessarily be earned by the assessee and the assessee alone. Therefore, even at the time of investing into those shares, the assessee knows that it may generate dividend income as well and as and when such dividend income is generated that would be earned by the assessee. In contrast, where the shares are held as stock-in-trade, this may not be necessarily a situation. The main purpose is to liquidate those shares whenever the share price goes up in order to earn profits. In the result, the appeals filed by the Revenue challenging the judgment of the Punjab and Haryana High Court in State Bank of Patiala also fail, though law in this respect has been clarified hereinabove.

14. It is, therefore, clear from the above observations of the Hon'ble Apex Court that depending upon the facts of each case, the expenditure incurred in acquiring the shares will have to be apportioned. Hon'ble Apex Court held that the tribunal and the Hon'ble High Court of Punjab and Haryana arrived at a correct conclusion by setting aside the disallowance under section 14 A of the Act in respect of the dividend earned on the shares held as stock in trade, because such shares were held during the business activity of the assessee and it is only by a quirk of fate that when the investee company declared dividend, those shares were held by the assessee, though the assessee has to ultimately trade those shares by selling them to earn profits.

15. Hon'ble Apex Court made a clear distinction of this case from the case of Maxopp investment Ltd were the assessee knew that whenever dividend would be declared by the investee company such dividend would necessarily be earned by the assessee and assessee alone, and it would be in the common knowledge of the assessee that such shares would generate dividend income as well as and when such dividend income is generated that would be earned by the assessee only. Hon'ble Apex Court in unequivocal terms held that in contrast, where the shares are held as stock in trade, this may not be necessarily a situation and the main purpose was to liquidate those shares whenever the share price goes up in order to earn profits. In the words of the Hon'ble Apex Court, the situation here is, therefore, different from the case like Maxopp Investment Ltd. where the assessee would continue to hold those shares as it wants to retain control over the investee company.

16. Hon'ble Apex Court, therefore, while rejecting the theory of dominant purpose in making investment in shares-whether it was to acquire and retain controlling interest in the other company or to make profits out of the trading activity in such shares - clearly made a clear distinction between the dividend earned in respect of the shares which were acquired by the assessee in their exercise to acquire and retain the controlling interest in the investee company, and the shares that were purchased for the purpose of liquidating those shares whenever the share price goes up, in order to earn profits. It is, therefore, clear that though not the dominant purpose of acquiring the shares is a relevant for the purpose of invoking the provisions under section 14 A of the Act, the shares held as stock in trade stand on a different pedestal in relation to the shares that were acquired with an intention to acquire and retain the controlling interest in the investee company.

17. In the circumstances and respectfully following the aforesaid binding precedent, we are of the considered opinion that Application of Rule 8D to the facts of the case is not correct, hence, the addition on this account is hereby directed to be deleted.

18. Now coming to the disallowance of the MAT credit in respect of surcharge and cess to tune of Rs. 1089399/-, Assessee placed reliance of the Tribunal's decision reported in the case of Consolidated Securities Ltd. v. Asstt. CIT [2018] 96 taxmann.com 418/172 ITD 163 (Delhi - Trib.) wherein, it was held that the amount of the MAT tax credit, inclusive of surcharge and education cess etc., if any, should be reduced from the amount of tax determined on the total income after adding surcharge and education cess, etc., and only the resultant amount payable will suffer interest under the relevant provisions of the Act. In the aforesaid decision, vide paragraph no. 8 & 9 it was held as under:

"8. A careful circumspection of the above provision deciphers certain things. First is that the amount of advance tax and TDS etc. rank pari passu with the amount of MAT tax credit available u/s. 115JAA. Secondly, the amount of tax payable for the year is determined after reducing the amount of advance tax, TDS and MAT credit. Thirdly, the resultant amount arrived at after making such deductions is the amount of tax, which the assessee is liable to pay. Fourthly, the amount of interest payable under any provision of this Act is calculated on the resultant amount. This shows that the amount of interest under the Act is liable to be paid on the amount of tax payable determined after deducting, inter alia, the amount of MAT tax credit.

9. We, therefore, hold that the amount of the MAT tax credit, 'inclusive of surcharge and education cess etc., if any, should be reduced from the amount of tax determined on the total income after adding surcharge and education cess, etc. Only the resultant amount payable will suffer interest under the relevant provisions of the Act. Since the amount of MAT tax credit is uncertain, we set aside the impugned order and remit the matter to the file of the Ld. AO for ascertaining the correct amount of MAT tax credit available with the assessee inclusive of surcharge and education cess etc., if any, and then allow tax credit as indicated above. Needless to say, the assessee will be allowed a reasonable opportunity of hearing in this regard."

19. The aforesaid decision is applicable to the facts of the present case on all fours and by respectfully following the same, we set aside the impugned order and remit the matter to the file of the Ld. AO for ascertaining the correct amount of MAT tax credit available to the assessee including of surcharge/cess and then allow tax credit as indicated in the decision of the Consolidated Securities Ltd. (supra).

20. In the result, the appeal filed by the Assessee stands partly allowed for statistical purposes.

Sd/- Sd/-

(G.D. AGRAWAL) (K. NARASIMHA CHARY)

President Judicial Member
Dated: 19th November, 2018.

Copy forwarded to

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi