

IN THE INCOME TAX APPELLATE TRIBUNAL: CAMP MUMBAI
BEFORE SHRI U. B. S. BEDI, JUDICIAL MEMBER (THIRD MEMBER)

ITA No. 5724 / Mum/ 2011
(Assessment Year 2008-09)

D. H. Securities Pvt. Ltd.,
PS-6, Rotunda Building 2nd Floor,
Mumbai Samachar Marg, Fort,
Mumbai-400023
PAN: ABCD1594L

v.

Dy. CIT, 4(1),
Mumbai - 400020

Assessee by: Shri S B Udhawat
Department by: S/Shri Santosh Kamal and S D Srivastava, CIT-DR

ORDER

The aforesaid appeal was heard initially by a Division Bench. There were however differences of opinion between the Members constituting the Division Bench. On a reference made by them, the Hon'ble President has nominated me as Third Member in terms of the provisions of section 255(4) of the Income-tax Act.

2. The Ld. Judicial Member has referred the following point of difference:

"Whether on the facts and in the circumstances of the case disallowance under section 14A of the I. T. Act, 1961 (the Act) can be made where dividend income has been earned on the shares held as stock in trade?"

3. The Ld. Accountant Member however felt that the point of difference referred by the Id. Judicial Member did not represent their points of difference correctly. He therefore referred the following points of difference.

"1) Whether it is permissible for the tribunal to base its decision on the decisions by the co-ordinate benches which were neither cited nor referred to at the time of hearing, or even before the authorities below, without confronting them to the parties, in view of the settled principles of natural justice, applied by the Hon'ble Jurisdictional

High Court in, inter alia, the case of Naresh K Pahuja Vs ITAT (2009) 224 CTR (Bom) 284?

- 2) *Whether the judgement of the Hon'ble Karnataka High Court in CCI Ltd. Vs Jt. CIT (2012) 250 CTR 291 (kar), which has not considered the applicability of the judgement of the Hon'ble Jurisdictional High Court in Godrej & Boyce Manufacturing Co. Ltd. Vs DCIT (2010) 328 ITR 81 (Bom) to the issue under appeal, can be followed, as it has been in the decisions referred to by the Ld. JM in his dissenting order, or is the said judgement of the Hon'ble Jurisdictional High Court, which has since been followed by the Hon'ble Calcutta High Court in Dhanuka & Sons Vs CIT (2011) 339 ITR 319 (Cal.), continues to hold the field in respect of the issue under appeal?*
- 3) *Whether the decision by the Hon'ble Karnataka High Court in CCI Ltd. (supra) is the solitary judgement by a High Court, as observed by the Ld. JM in his dissenting order, notwithstanding the fact that the Hon'ble Calcutta High Court has also dealt with the issue under appeal, considering the decision by the Apex Court in CIT Vs Walfort Share and Stock Brokers P. Ltd. (2010) 326 ITR 01 (S.C.) (supra) as well as by the Hon'ble Jurisdictional High Court in Godrej & Boyce (supra)?*
- 4) *Whether the tribunal can be said to have taken a consistent view in the matter, as observed by the Ld. JM in his dissenting order, notwithstanding the facts that the tribunal has also, as in American Express Bank Ltd. (in I.T.A. No. 5904 & 6022/Mum/2010 dated 08.08.2012) and Dy. CIT Vs Damani Estates & Finance Pvt. Ltd. (in I.T.A. No. 3029/Mum/2012 dated 17.07.2013), following the Hon'ble Jurisdictional High Court in Godrej & Boyce (supra) and Hon'ble Calcutta High Court in Dhanuka & Sons (supra), taken a view in conformity with the said judgements?*
- 5) *Whether the order as proposed by the AM is by culling out and based on the principles of apportionment governing the application of Section 14A, as explained by the Hon'ble Court in Godrej & Boyce (supra), upholding the order by the tribunal passed following the decision in ITO Vs Daga Capital Management Pvt. Ltd. (2009) 117 ITD 169 (Mum) (SB), or does the same represent an out of context reading of the said decision by the Jurisdictional High Court, which is therefore not germane or relevant to the issue?*

6) *Whether, even on facts, can it be at all said that no expenditure in relation to the dividend income stands incurred by an assessee where the shares yielding such income are held as stock in trade?"*

4. Cross appeals, i.e., appeal bearing I.T.A. No. 5163/Mum/2011 by the Department and another appeal bearing I.T.A. No. 57245/Mum/2011 by the assessee, were filed before this Tribunal for the assessment year 2008-09. A consolidated order was proposed by the Ld. Accountant Member. The Ld. Judicial Member agreed with the order disposing of Department's appeal bearing I.T.A. No. 5163/Mum/2011. He however differed from the view taken by the Ld. Accountant Member in the assessee's appeal bearing I.T.A. No. 5724/Mum/2011. Both of them consequently proceeded to refer their points of difference to the Hon'ble President, which have been already been stated earlier in this order.

5. On the date fixed for hearing, the ld. counsel for the assessee filed an application for adjournment on the ground that two of the partners of the CA firm, who had briefed the counsel, have gone out of station to attend Jain Festival and therefore the case may be adjourned. But when the counsel for the assessee was asked to show whether this firm of CA has been engaged by the assessee through any power of attorney having been executed in their favour, the Ld. A.R. was unable to show the same. Therefore the request for adjournment was turned down in the absence of any power of attorney executed by the assessee in favour of the firm of the CAs. The ld. counsel for the assessee was given the option to proceed with his arguments. At this juncture, the ld. counsel for the assessee filed written submissions along with copies of the decisions in support of the case of the assessee and prayed that the matter may be decided accepting the view taken by the Ld. Judicial Member.

6. The issue in this appeal relates to disallowance made by the AO u/s 14A read with Rule 8D of a sum of Rs.12,23,627/-. It is the case of the assessee that it is engaged in the business of trading in shares and therefore its main object is to earn profit on purchase and sale of shares and not to earn dividend income from such shares. According to the assessee, the accrual of dividend from such shares, which is exempt from tax, is merely incidental to holding of shares held as stock in trade and not as investment. It was submitted that no expenditure/interest can be disallowed u/s 14A by relating the same to the dividend income because no expenditure was, as a matter of fact, incurred with the view to earn dividend. The assessee also relies on the computation of disallowance under Rule 8D read with Section 14A as worked out by the A.O. in para 5.4 at page 3 of the assessment order in which the A.O. himself, according to the assessee, has noted that the assessee has not incurred any direct or indirect expenditure relating to exempt income, i.e., dividend, but has still invoked section 14A under the last clause which is a presumptive disallowance and not an actual disallowance. Supporting the view of the Id. Judicial Member, it was submitted on behalf of the assessee that the issue under appeal was covered by the decision of the Hon'ble Karnataka High Court in the case of CCI Ltd. Vs Jt. CIT in I.T.A. No. 359/2011 dated 28.03.2012 as also many other decisions of different Benches of this Tribunal, namely, Dy. CIT Vs India Advantage Securities Ltd. in I.T.A. No. 6711/Mum/2011 for assessment year 2008-09, Ambit Securities Broking Pvt. Ltd. Vs ACIT in I.T.A. No. 7856/Mum/2011 for the assessment year 2008-09 and M/s. N D Nissar Vs ACIT in I.T.A. No. 8542/Mum/2010 for assessment year 2007-08 dated 14.09.2012, 06.02.2013 and 26.06.2011 respectively. It was also submitted that the Id. Judicial Member, while deciding the issue in favour of the assessee, has taken note of the decision in the case of Godrej & Boyce Manufacturing Co. Ltd. Vs CIT 328 ITR 81 (Bom.), and adverse decision in CIT Vs Daga Capital Management Pvt. Ltd. (2009) 117 ITD 169 (Mum) (SB) as well

as in Jt. CIT Vs American Express Bank Ltd. (2012) 138 ITD 288 (Mum.). It was further submitted that the Ld. Judicial Member has chosen to follow the above referred later direct decision of the Hon'ble Karnataka High Court in CCI Ltd. Vs CIT (supra) in favour of the assessee. It was also clarified that the Hon'ble Bombay High Court decision in the case of Godrej & Boyce Manufacturing Co. Ltd. (supra) is applicable only where shares are held as investment and not where the shares are held by the assessee as stock in trade while Special Bench decision in the case of Daga Capital Management Pvt. Ltd. (supra) is applicable where shares are held as stock in trade.

7. It was further submitted that it is well settled that once the authority higher than the Tribunal has expressed an opinion on the issue before the tribunal, it is not permissible to rely upon a contrary decision of the tribunal including decision of a Special Bench. Reliance was placed on Tej International Pvt. Ltd. Vs Dy. CIT (2000) 69 TTJ (Del.) 650 and the decision in the case of CIT Vs Godavari Devi Saraf (1978) 113 ITR 589 (Bom.).

8. The assessee also relied upon the decisions in the case of Yatish Trading Co. Pvt. Ltd. Vs ACIT (2011) 129 ITD 237 (Mum) dated 10.11.2010 and Prakash K Shah & Securities Pvt. Ltd. Vs Addl. CIT in I.T.A. No. 3339/Mum/2010 dated 29.09.2011. Apropos the decisions of this Tribunal in the case of Daga Capital Management Pvt. Ltd. (supra) and American Express Bank Ltd. (supra) and of the Bombay High Court in Godrej Boyce Manufacturing Co. Ltd. (supra) on which reliance has been placed by the Revenue, it was submitted that they were not applicable in view of the decision of the Karnataka High Court in CCI Ltd. v. JCIT (supra). According to the assessee, it is not open to pick out a few words or sentences from the decision of the Hon'ble Bombay High Court in the case of Godrej & Boyce Manufacturing Co. Ltd., which, on the facts of the case, is not

applicable. For this proposition, reliance was placed on the decisions in the case of CIT Vs Sun Engineering Works Pvt. Ltd. (1992) 198 ITR 297, Goodyear India Ltd. Vs State of Haryana, 188 ITR 402 (S.C.), CIT Vs Sudhir Jayantilal Mulji 214 ITR 154, CIT Vs Kamla Devi Rathi 213 ITR 177 (Patna), Gujarat State Cooperative Bank Ltd. Vs CIT 250 ITR 229 (Guj.) and Cit Vs K Ramakrishnan 202 ITR 997.

9. The Ld. D.R., in reply, submitted that Rule 8D was brought on the statute book with effect from 2008-09 and that the assessment year involved in the matter under appeal was also AY 2008-09. He submitted that decisions rendered in Yatish Trading Co. Pvt. Ltd. (supra) and CCI Ltd. (supra) related to assessment years prior to AY 2008-09 and therefore were not applicable. He submitted that the Hon'ble jurisdictional High Court in the case of Godrej & Boyce Manufacturing co. Ltd. Vs DCIT (2010) 328 ITR 81 (Bom.) has held that Rule 8D is mandatory from 2008-09 onwards. The assessee has suo motu disallowed Rs.1,22,295/- as expenditure incurred in earning exempt income which has been not accepted by the Revenue as the disallowance was required to be worked out on the basis of Rule 8D. The AO therefore proceeded to make disallowance as provided under Rule 8D read with section 14A.

10. I have heard both the parties, carefully considered their submissions including the authorities referred to by them and the orders passed by both the Members constituting the Division Bench. The matter under appeal relates to AY 2008-09. It is accepted by both the parties that the assessee is a dealer in shares and that the shares were held by it as stock in trade. The issue under appeal is squarely covered by the principles laid down by the Hon'ble jurisdictional High Court in Godrej & Boyce Manufacturing Co. (supra) as also by the judgment of the Hon'ble Calcutta High Court in Dhanuka & Sons (supra) and by the decisions

of this Tribunal in JCIT v. American Express Bank (supra) and DCIT v. Damani Estates and Finance (supra) in which the issue under appeal has been elaborately considered. It may be relevant to mention that the ld. Judicial Member himself is a party to the order passed by this Tribunal in American Express Bank, which has been followed by the ld. AM. The aforesaid judgments relate to the assessment years after the insertion of Rule 8D in the Income-tax Rules. In my considered view, the ld. AM has rightly, after careful consideration of all the relevant aspects of the case, followed the aforesaid decisions. The ld. AM has rightly observed that the judgment of the Hon'ble Karnataka High Court in CCI is not a solitary judgment on the issue under appeal in as much as the issue under appeal has also been considered for the relevant assessment year by the Hon'ble Calcutta High Court also as also by the Division Benches of this Tribunal.

11. The assessee has mainly relied upon the decision of the Hon'ble Karnataka High Court in the case of CCI Ltd. (supra) and other tribunal decisions including three decisions in which CCI Ltd.'s decision has been followed. There is nothing in the said judgment of the Hon'ble Karnataka High Court to show that the judgment of the Hon'ble jurisdictional High Court in Godrej & Boyce (supra) was brought to its notice or considered by it. On the other hand, the said judgment of the Hon'ble jurisdictional High Court has been, as rightly observed by the ld. AM, duly considered by the Hon'ble Calcutta High Court, which has subsequently been followed by the Division Benches of this Tribunal in American Express Bank (supra) and Damani Estates & Finance (supra).

12. In view of the foregoing, it is held that disallowance under section 14A of the I-T Act, 1961 can be made in conformity with law even in cases where dividend income has been earned on the shares held as stock in trade. I concur with the order passed by the ld. AM as also the reasoning given by him in support

of his order. The matter shall now go back to the Division Bench for passing appropriate order in conformity with the majority opinion.

27.11.2013

Sp.

Sd /-
(U.B.S.BEDI)
Judicial Member