

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI**

Before Shri. G. E. Veerabhadrapa, VP and Shri. George Mathan, JM

ITA No. 3198/D/2004
Asst Year: 1999-2000

GE Capital Services India, AIFACS DCIT, Circle 12 (1), New Delhi
Building I, Rafi Marg, New Delhi 110 001.
(Appellant) (Respondent)

ITA No. 3200/D/2004
Asst Year: 1999-2000

DCIT, Circle 12 (1), New Delhi GE Capital Services India, AIFACS
Building I, Rafi Marg, New Delhi 110 001.
(Appellant) (Respondent)

Appellant by: S/Shri M S Syali, Adv. & Tarandeep Singh, CA
Respondent by: Shri Durga Charan Dash, CIT DR

O R D E R

Per: G E Veerabhadrapa:

When this matter was listed for hearing there was a request for constituting a larger Bench of 5 Members on which both sides were extensively heard and the assessee has given a detailed synopsis including the case laws that support its stand. In short, we may state that the assessee is a resident Non- Banking Financial Company. It is carrying on the business of providing finance to industry, trade etc. through hiring, purchase, lease and loans, and carried out bill discounting, investment and capital management operations and consultancy services also.

2. In the course of business the assessee has received dividend of Rs.1,81,62,786/- which has been claimed as fully exempt u/s. 10(33) of the Act. According to the AO, the exemption u/s. 10(33) is available not on the gross dividend receipts but on the net dividend income. In the absence of information, the AO estimated a 25% of the gross dividend as having been spent in management/administrative and other costs relating to earning of dividend. The said amount is reduced from the gross dividend and only the net dividend income was held exempt.

3. The assessee was unsuccessful before the CIT (A). It is stated before us that the issue is directly covered against the assessee by the decision of the Special Bench in the case of Daga Capital Management Pvt. Ltd. (2008) 26 SOT 603 (Mum)(SB). In the said decision it was held that sec. 14A(1) inserted by the Finance Act 2001 w.e.f. 1-4-1962 read with

insertion of special section (2) and (3) of the Finance Act 2006 w.e.f, 1-4-2007 are retrospective and operate pari-passu with sub-section to section (1) with retrospective effect from 1.4.1962. The disallowance, therefore, has to be calculated as per the mandate under Rule 8-D which was inserted by the Income Tax (5th Amendment) rules 2008 w.e.f. 24-3-2008. The short submission before us is that this view of the Special Bench requires reconsideration by a larger Bench.

4. For this proposition, heavy reliance was placed on to the Special Bench of the Tribunal in the case of Kuber Tobacco Products Pvt, Ltd. According to the assessee, the principles laid down in the case of Kuber Tobacco Products Pvt, Ltd. (supra) are discussed with approval in the decision of the Shyam Sunder & Ors. Vs. Ram Kumar (2001) 8 SCC 24. All these decisions are placed in the ' paper book.

5. It was pointed out that it is erroneous to presume that there was no fresh liability imposed upon the assessee as a result of the above interpretation of Rule 8-D. It was submitted before us that it creates a departure from settled principles and goes far beyond the object and scope of section 14A (1) of the Act.

6. The Id. Counsel strongly pleaded that it results in an onerous liability which takes it beyond the pale of being a mere procedural / clarificatory or declaratory provision. Further, it was demonstrated that disallowance of expenditure as per Rule 8-D for the assessment year in question on a dividend income of Rs. 1.81 crore works out to Rs. 6.12 crores. As against the dividend income of Rs. 58 lakhs for the assessment year 2000-01, the disallowance works out to Rs. 10.2 crores and for assessment year 2001-02, as against the dividend income of Rs.6.8 crores the disallowance under Rule 8-D works out to Rs.13.06 crores. The anomaly is further glaring from the fact that while making a disallowance even after introduction of sec. 14A along with its Rule 8-D the AO himself proposed a disallowance of only 25% of the dividend income whereas by application of these rules the disallowance could have worked out to astronomical times of the gross dividend received.

7. The intention of section, the Id. Counsel pleaded was to disallow an expenditure that relates to earning of exempt income and not to disallow some astronomical expenditure determined as per artificial Rules. The disallowance that is mandated by that Rule many a times far exceeds the income. In effect there will be an enhancement of income if a free run to Rule 8-D is to be allowed in the manner in which the Special Bench has construed.

8. The Id. Counsel pointed out that the moment there is an exempt income according to the Special Bench, application of Rule 8-D becomes mandatory. There is no point left to decide as to what is and what is not relatable to the exempt income which according to him can give absurd results and unintended hardships. It unsettles the well-settled principles of various decisions of the High Courts and the Hon'ble Supreme Court. To the effect a special legislation like rule 8-D cannot by implication be retrospective. Heavy reliance was placed on the decision of the Hon'ble Supreme Court in the case of Bakul Cashew, 159 ITR 565 (SC). According to the Id, Counsel for the assessee, after Rule 8-D is introduced expressly w.e.f. 24-3-08 and it cannot be held to be operative

retrospectively from the date of the insertion of the provisions of section 14A as it results in great prejudice to the assessee and creates absurd results.

9. The ld. DR, on the other hand, strongly opposed the constitution of a larger Bench in the facts and circumstances of the case. According to him, the issue is covered in favour of the Revenue by the decision of the Special Bench in the case of Daga Capital Management Pvt. Ltd. (supra) and the Tribunal as a Division bench must faithfully follow the decision of the Special Bench and it was also pointed out that the decision of the Special Bench has been challenged by Daga Capital Management Pvt. Ltd. (supra) before the Bombay High Court by way of an appeal u/s. 260A of the Act. Any constitution of a larger Bench at this stage is quite unnecessary and unwarranted. Let the matter be disposed off in the light of Special Bench.

10. We have gone through the respective submissions in the light of records. Although at the time of hearing, the initial impression was to write a reference to the President, ITAT, for constituting a larger Bench, but interesting developments that have come to our notice, suggest us otherwise.

11. It has come to our notice that against the order of ITAT Special Bench, Mumbai, dated 20.10.2008 in ITA no. 8057/M/03, in the case of Daga Capital Management Pvt. Ltd., the assessee has filed appeal u/s. 260A before the Bombay High Court. It has also come to our notice that the following substantial questions of law have been framed by the assessee in the said appeal:

"1. Whether, in the facts and in the circumstances of the case, and in law, the Special Bench of the tribunal erred in enlarging the scope of the question referred before it by adjudicating, and relying upon, the issue concerning Rule 8D of the Income Tax Rules, 1962 and its retrospectively, when neither such rule was in existence when the reference made before the Special Bench nor such rule was a subject matter of the reference?

2. Assuming - but not admitting - that the Tribunal had jurisdiction to do so, whether, in the facts and in the circumstances of the case, and in law, the Tribunal erred in adjudicating this issue without granting proper, effective and adequate opportunity of being heard to the Appellant?

3. Whether, in the facts and in the circumstances of the case, and in law, the Tribunal erred in bypassing / ignoring the number of judicial precedents referred to and relied upon by the Appellant and/ or not dealing with the important legal issues as referred to and relied upon by the Appellant?

4. Whether, in the facts and in the circumstances of the case, and in law, the Tribunal erred in holding that the provisions of section 14A of the Income-tax Act, 1961, are applicable with respect of dividend income earned by the assessee, engaged in the business of dealing in shares and securities, on the shares held as stock in trade and when earning of such dividend income is, therefore, incidental to trading in shares?

5. Whether, in the facts and in the circumstances of the case, and in law, the Tribunal erred in holding that section 14A is applicable to all expenses incurred even if earning of an exempt income is merely incidental and there is no connection between the two or even if relation is indirect and remote?

6. Whether, in the facts and in the circumstances of the case, and in law, the Tribunal erred in holding that if there is an exempt income, the disallowance u/s. 14A has to automatically follow, irrespective of connection between the two?

7. Whether, in the facts and in the circumstances of the case, and in law, the Tribunal erred in placing reliance upon sub-section (2) and (3) of section 14A and Rule 8D for interpreting the main provisions of section 14A and thereby enlarging the scope of the main provision?

8. Whether, in the facts and in the circumstances of the case, and in law, the Tribunal erred in holding that sub-section (2) and (3) of section 14A and Rule 8D of Income-tax Rules have been retrospective effect?"

12. It has also come to our notice that the Hon'ble Bombay High Court appears to have accepted question nos. 1,2,4 and 8, above, as substantial questions of law arising from the order of the Special Bench in the case cited supra.

13. It has also come to our notice that M/s Cheminvest Ltd., New Delhi, who was the intervener before the Special Bench of the ITAT, has also filed its appeal before the Delhi High court and it is reported to be pending for admission.

14. After considering the developments and in the light of the decision taken by the President ITAT in the case of Star India Pvt. Ltd., wherein identical situation the President having constituted a Special Bench for the subsequent year, has disbanded the Special Bench on being pointed out by the Revenue that a question of law has been admitted by the Bombay High Court in an earlier year. The Hon'ble President in the said order has opined that the Benches should await for the higher wisdom and be guided by the decision of the High Court, instead of constituting Special Benches for disposal of the matter in such situations.

15. In the light of the above discussions, we are constrained not to accept the request of the assessee for constitution of a larger Bench. We, therefore direct the Registry to block these appeals for a period of 6 months or till the disposal of appeal by the Bombay High Court in the case of Daga Capital Management Pvt. Ltd. (supra), whichever is earlier.

16. The parties must bring to the notice of the Tribunal about the outcome of the aforesaid appeals pending before the High Courts, so that a decision can be taken to post these appeals before the Division Bench.

17. In the result, the prayer in the appeals are disposed off in the above manner.

Order pronounced in the Court on 3.07.2009.

Sd/-
(G.E. Veerabhadrapa)
Vice President

sd/-
(George Mathan)
Judicial Member

Copy forwarded to:-

1. M/s GE Capital Services India
2. DCIT, Circle 12 (1), New Delhi.
3. CIT(A)
4. 4. CIT
5. 5. DR

By Order
Dy. Registrar