

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'आई' मुंबई।

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

सर्वश्री नरेन्द्र कुमार बिल्लैय्या, लेखा सदस्य एवं अमित शुक्ला, न्यायिक सदस्य के समक्ष

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER &

SHRI AMIT SHUKLA, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No. 618/Mum/2012

(निर्धारण वर्ष / Assessment Year : 2008-09

IDBI Capital Market Services Ltd. 3 rd Floor, Maftlal Center, Nariman Point, Mumbai 400021	बनाम/ Vs.	The DCIT, Range 4(1), Aaykar Bhavan, MK Marg, Mumbai 400020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACI 1268F		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Appellant by	Shri N.C. Jain
Respondent by	Shri Kishan Vyas

सुनवाई की तारीख / Date of Hearing :12.02.2015

घोषणा की तारीख /Date of Pronouncement:18.02.2015

आदेश / ORDER

PER N.K.BILLAIYA, JM:

This appeal by the assessee is directed against the order of the Ld. CIT(A)-9, Mumbai dated 8/11/2011 pertaining to assessment year 2008-09. The assessee has challenged three additions/disallowances made by the AO. The first disallowance is in respect of mark to market loss of Rs.18,29,87,255/- . The second disallowance is in respect of non-deduction of tax at source on payment made to Bombay Stock Exchange amounting to Rs.94,01,055/- and

the third disallowance is made under section 14A of the Income Tax Act, 1961 (the Act) amounting to Rs.1,00,76,221/-.

2. The assessee is engaged in the business of investment, share broking and Government securities and it is a member of Bombay Stock Exchange as well as National Stock Exchange. The return for the year was selected for scrutiny assessment. While scrutinizing the return of income the AO noticed that an amount of Rs.18,29,87,255/- has been debited to loss on Swaps being mark to market loss as on 31/3/2008. The assessee was asked to justify the same. The assessee explained that as on 31st March the outstanding interest Swap contracts were valued and in case there was a loss in valuation the same is debited to P&L Account. It was further explained that the transaction of the assessee is akin to foreign exchange derivative. The Accounting Standard AS-11 deals with giving of accounting treatment for the effect of changes in foreign exchange rate. The assessee also relied upon the decision of the Hon'ble Supreme Court in the case of Woodward Governor India Pvt. Ltd. [2009] 179 Taxman 326 (SC). After considering the facts and the submissions, the AO observed that the assessee has recognized only the loss and not the profit. According to the AO the assessee has not been consistent and definite in making entries in the account books in respect of losses and gain and accordingly denied the claim of deduction of Rs.18,29,87,255/-.

2.1 Proceeding further, the AO noticed that the assessee has paid lease line and transaction charges to Bombay Stock Exchange. The total amount paid was at Rs.94,01,055/-. The AO was of the firm belief that assessee ought to have deducted tax under section 194J of the Act, failing which the assessee has violated the provisions of section 40(a)(ia) of the Act. The AO accordingly,

disallowed the entire payment made to the Bombay Stock Exchange amounting to Rs.94,01,055/-.

2.2 The AO further observed that the assessee has shown dividend income of Rs.85,14,000/-. The same is claimed as exempt. However, the AO noticed that the assessee has not disallowed proportionate expenses in relation to such exempt income in view of section 14A of the Act. The assessee was asked to justify its claim. The assessee submitted its computation of expenditure at Rs. 99,89,517/-. The AO proceeded by invoking the formula given under Rule 8D and computed disallowance at Rs.1,00,76,221/-. Aggrieved by these three disallowances/ additions the assessee carried the matter before Ld. CIT(A).

3. In so far as the addition on account of mark to market loss the Ld. CIT(A) after considering the facts and the submissions relied upon the decision of the Hon'ble Bombay High Court in the case of **Bharat Ruia** in ITA No.1539 of 2010, treated the loss as speculation loss and confirmed the disallowance. Ld. CIT(A) also confirmed the disallowance treating the same as contingent liability.

4. Before us, Ld. Counsel for the assessee explained the nature of transaction. Ld. Counsel for the assessee stated that mark to market loss are allowed following the decision of the Tribunal Special Bench Mumbai in the case of Bank of Beherain & Kuwait , ITA No.4404 & 1883/Mum/2004, ABN Ambro Securities in ITA No.7073/Mum/2006. Ld. Counsel for the assessee further stated that the liability is not contingent liability. Reliance in this connection was placed on the decision of the Hon'ble Supreme Court in the case of Woodward Governor India Pvt. Ltd. (supra). The Ld. Counsel further stated that the reliance on the decision of Hon'ble Bombay High Court in the

case of Bharat Ruia (supra) is totally misplaced as the Swap agreement is not a derivative contract and cannot be termed as commodity for the purpose of section 43(5) of the Act.

5. Per contra, Ld. DR strongly supported the orders of the Revenue authorities.

6. We have carefully perused the orders of the authorities below and the relevant documentary evidences brought on record before us. It is an undisputed fact that the assessee has made the valuation of interest rate Swap contracts as at the end of the year. It is also an undisputed fact that assessee had incurred losses on such valuation. The said losses have been claimed as deduction in the P&L Account. It is also an undisputed fact that the assessee has made the entries following Accounting Standard, AS-11 of the ICAI. Such losses being treated as mark to market the losses have been allowed by the Tribunal in series of cases following Special Bench decision in the case of Bank of Bahrain & Kuwait (supra). The Hon'ble Supreme Court in the case of Woodward Governor India Pvt. Ltd.(supra) has considered such losses as allowable and not of contingent in nature. We find that the observations of the AO that the assessee has never accounted for the gains on such transactions is totally misplaced and against the facts of the case. As we find in the P&L Account at page 49 of the paper book when the assessee had gains of Rs.25.57 lacs the assessee has included the same in its income. Considering the facts in totality and in the light of judicial decisions, we set aside the findings of Ld. CIT(A) and direct the AO to delete the addition of Rs.18,29,87,255/-. Ground No.1 is allowed.

7. Ground No.2 is in relation to the disallowance made under section 40(a)(ia) of the Act in respect of payments made to Bombay Stock Exchange. We find that this issue is squarely covered in favour of the assessee and against the Revenue except that the transaction charges have been considered to be subject to TDS by the decision of Hon'ble Bombay High Court in the case of Kotak Securities Ltd in Income Tax appeal No.3111 of 2009. However, we find that the Hon'ble High Court has observed that section 194J was inserted w.e.f. 1/7/1995 and till assessment year 2005-06 both the Revenue and the assessee proceeded on the footing that section 194J was not applicable to the payment of transaction charges and accordingly during the period from 1995 to 2005 neither the assessee has deducted tax at source nor the Revenue has raised any objection. The Hon'ble High Court further observed that in these circumstances if both the parties for nearly a decade proceeded on the footing that section 194J is not attracted, then in the assessment year in question, no fault can be found with the assessee in not deducting tax at source under section 194J of the Act and consequently, no action could be taken under section 40(a)(ia) of the Act.

7.1 Return of income for the year under consideration was filed on 14/08/2009 and this decision of the Hon'ble was pronounced on 21/10/2011. Thus, the assessee had already filed the return of income and the time period for deducting tax at source was also lapsed. Considering these peculiar facts, in our considered opinion no disallowance on this account should be made for the year under consideration. Ground No.2 is accordingly allowed.

8. Ground No.3 relates to the disallowance made under section 14A of the Act. Before us Ld. Counsel for the assessee stated that even if section 14A r.w. Rule 8D is applicable the AO has worked out the disallowance not in

consonance with the spirit of section 14A r.w. Rule 8D. It is the say of the Ld. Counsel that the AO erred in including in average investment even then investment income from which is not exempt. We have given thoughtful consideration to these submissions of the Ld. Counsel. In our considered opinion this issue needs to be verified at the assessment stage. We accordingly, restore this issue to the file of the AO. The AO is directed to consider this issue afresh in the light of the provisions of section 14A r.w. Rule 8D keeping in mind that investment from which the income is taxable should not be included in computation of the average investment. Ground No.3 is treated as allowed for statistical purposes.

9. In the result, the appeal filed by the assessee is partly allowed.

_ Order pronounced in the open court at the time of hearing on 18th day of Feb. 2015.

Sd/-

(AMIT SHUKLA)

न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-

(N.K. BILLAIYA)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 18. 02.2015

व.नि.स./ VM , Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार

(Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai