

IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI B R BASKARAN, ACCOUNTANT MEMBER

ITA No.2054/Bang/2019
Assessment year : 2013-14

The Assistant Commissioner of Income Tax, Circle 4(1)(2), Bangalore.	Vs.	M/s. M.N. Dastur Company Pvt. Ltd., 7 th Floor, Raheja Towers, 26/27, M.G. Road, Bangalore – 560 001. PAN: AABCM 1236M
APPELLANT		RESPONDENT

Appellant by	:	Shri Priyadarshi Mishra, Jt.CIT(DR)(ITAT), Bengaluru.
Respondent by	:	None

Date of hearing	:	18.06.2020
Date of Pronouncement	:	24.06.2020

ORDER

Per N.V. Vasudevan, Vice President

This is an appeal by the Assessee against an order dated 30.7.2019 of CIT(Appeals)-4, Bengaluru, whereby the CIT(A) dismissed an application filed by the revenue u/s.154 of the Income-Tax Act, 1961 [“the Act”] seeking rectification of CIT(A)’s order dated 2.4.2019 allowing appeal of an Assessee against the order of AO u/s.154 of the Act dated 19.9.2017.

2. The facts are that the assessee is a company engaged in the business of rendering consulting engineering services and software services. For the AY 2013-14, the AO determined the total income of the assessee by his order dated 28.3.2016 passed u/s. 143(3) of the Act at a

loss of Rs.10,06,35,057 as per the normal provisions of the Act and at Rs.12,82,11,059 as per the provisions of section 115JB of the Act (tax on book profits). While computing income under the normal provisions of the Act, the AO had made disallowance of expenses u/s. 14A of the Act read with Rule 8D of the I.T. Rules [the Rules] of a sum of Rs.31,80,204. However, while computing book profits u/s. 115JB of the Act as per Clause(f) of Explanation-1 below Sub-Section (2) of Sec.115JB of the Act, the amount of any expenditure relatable to any income to which Sec.10 other than Sec.10(38) or Sec.11 & 12 of the Act which has to be added back to the book profit was omitted to be done. Hence proceedings u/s.154 of the Act to rectify mistake apparent from the record was initiated by the AO. The AO by an order passed u/s.154 of the Act dated 19.9.2017, added the sum disallowed u/s. 14A of the Act read with Rule 8D of the Rules of a sum of Rs.31,80,204 to the profit as per profit & loss account of the assessee prepared in accordance with the provisions of the Companies Act, 1956, while computing book profits u/s.115JB of the Act. The book profit on which tax was payable u/s.115JB of the Act stood enhanced accordingly.

3. Aggrieved by the said order dated 19.9.2017, the Assessee filed appeal before CIT(A) contending that in the first place there is no mistake apparent on record which requires to be rectified as a mistake apparent on record, it must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may be conceivably two opinions as held in the case of *T.S Balaram, ITO v Volkart Bros., 82 TIR 50 (SC)*. The issue, whether disallowance u/s 14A can be added back to the book profit u/s. 115JB has been decided by the Special Bench Delhi ITAT in the case of *ACIT v Vireet Investments Pvt Ltd-58 1TR 313 Delhi (SB)* wherein it is held as under:-

"(iii) That the disallowance under section 14A read with rule 8D could not be added while computing the book profits in terms of section 115JB as the Explanation to that section did not specifically mention section 14A of the Act. Hence the computation under clause (f) of Explanation 1 to section 115JB(2) was to be made without resorting to the computation as contemplated under section 14A read with rule 8D of the Rules."

4. The assessee prayed that the addition to book profits of disallowance u/s 14A is a debatable issue as for making a disallowance the AO should consider whether any interest bearing funds are involved in exempt income, any separate books of accounts were maintained or not, the basis on which the disallowance was made by the assessee, the reason to give as to why the disallowance is not acceptable and the grounds on which a fresh disallowance of Rule 8D is being made. Proper reason has to be recorded before disallowance could be made under this Section.

5. The CIT(A) by his order dated 2.4.2019 allowed the appeal holding as follows:-

"6.2 I am of the opinion that the disallowance u/s. 14A made by the AO is highly debatable issue and cannot be made u/s. 154 o the IT Act.

6.3 In the light of various decisions of the Courts, a non-speaking order and a debatable issue cannot form a part of the 154 proceedings and is bad in law. Keeping the Hon'ble Supreme Court judgment in the case CIT Vs. Hero Cycles Pvt. Ltd. etc. (1997) 228 ITR 463 (SC), wherein the Hon'ble Supreme Court of India has held as under:

"Rectification under section 154 can only be made when a giving mistake of fact or law committed by the officer passing the order becomes apparent from the record. Rectification is not possible if the question is debatable. Moreover, a point which was not examined on facts or in

law cannot be dealt with as a mistake apparent from the record.”

And Madras HC in the case of CWT Vs. Sri Ram and Ors, 15 Taxman. 149 (Mad.) and also [2018] 96 taxmann.com 542 (Jaipur-Trib) [2018] 172 ITD 571 (Jaipur-Trib) and also taking into consideration the special bench decision in the case of ACTT v Vireet Investments Pvt Ltd-58 ITR 313 Delhi, wherein this issue "whether disallowance u/s 14A can be added back to book profit u/s 115JB" has been held in the favour of assessee, the assessee grounds are allowed.

7 In the result, the appeal is allowed.”

6. Aggrieved by the aforesaid order of the CIT(A), the revenue filed an application u/s.154 of the Act against the order dated 2.4.2019 before the CIT(A). The revenue contended in the said application that ITAT Bangalore in the case of *DCIT v. Shobha Developers* [58 taxmann.com 107] vide order dated 09.01.2015 has held that where expenditure was disallowed by the AO by invoking section 14A while computing total income under normal provisions, same disallowance would be adopted while arriving at the book profits. Since the CIT(A) in the order dated 2.4.2019 has allowed assessee's appeal stating that disallowance on account of addition u/s. 14A being highly debatable issue, the addition cannot be made u/s. 154 of the IT Act, which is contrary to the decision of the jurisdictional ITAT referred above on the issue of addition relating to 14A disallowance u/s. 115JB, the AO prayed for rectification of the order dated 2.4.2019.

7. By the impugned order the CIT(A) dismissed the said application by the revenue observing as follows:-

“3. I have gone through the miscellaneous petition and the issue raised therein. I have considered all the argument made in the miscellaneous petition and the reason for decision taken is reflected in my order dated 02-04-2019 in paras 6.1 to 6.3 I don't

find any infirmity in the order dated 02-04-2019 passed by this office.

4. Hence the miscellaneous petition is dismissed accordingly.”

8. Aggrieved by the aforesaid order of CIT(A) the revenue has preferred the present appeal before the Tribunal. We have heard the contention of the learned DR who reiterated the stand of the revenue as contained in the application u/s.154 of the Act and the grounds of appeal raised before the Tribunal by the revenue which reads as follows:

“1. The Order of the Ld.CIT (A) is opposed to the law and facts of the case.

2. The Ld. CIT(A) is not correct in dismissing the Misc. Petition filed by the AO by relying on a decision of special bench ITAT, New Delhi by ignoring the decision of Hon'ble ITAT Bangalore on the same issue in the case of DCIT CC-2(2) Bangalore Vs Shobha Developers, 58 taxmann.com 107 which clearly held that the amount disallowed by AO u/s.14A while computing total income under normal provision should also be disallowed while arriving at book profit.

3. The Ld. CIT(A) is ought to have appreciated that the provision of explanation 1(f) below second proviso of section 115JB(2) clearly provides for increase of book profit by an amount of expenditure relatable to any income which is exempt u/s.10, 11 or 12, makes the issue mistake apparent from records.”

9. The AR for the Assessee sought adjournment but since the issue is covered by a decision of Special Bench in the case of *Vireet investments (supra)*, the same was not granted.

10. As far as the amount to be added to the profit as per P&L account u/s. 115JB of the Act towards expenditure incurred in earning income exempt u/s. Chapter III of the Act, the plea of the assessee was that the disallowance u/s. 14A of the Act made while computing total income under

the normal provisions of the Act should not be automatically added while determining the book profits u/s. 115JB of the Act. In support of the stand taken by the assessee, the assessee has placed reliance on the decision of the Delhi Special Bench of ITAT in the case of *ACIT v. Vireet Investments Pvt. Ltd., 165 ITD 25 (Del)(SB)*. In the aforesaid decision, two questions were considered by the Special Bench which are as follows:-

- “(i) Whether the expenditure incurred to earn exempt income computed u/s 14A could not be added while computing book profit u/s 115JB of the Act? And
- (ii) Whether investments which did not yield any exempt income should enter into the computation under Rule 8D while arriving at the average value of investment, income from which does not form part of the total income?

11. The Special Bench answered the aforesaid questions as follows:-

- “(i) We answer the question referred to us in favour of assessee by holding that the computation under clause (f) of Explanation 1 to section 115JB(2). is to be made without resorting to the computation as contemplated u/s 14A read with Rule 8D of the Income-tax Rules, 1962.
- (ii) Only those investments are to be considered for computing the average value of investment which yielded exempt income during the year.

12. Thus, it is clear that the amount to be added while computing book profits u/s. 115JB of the Act, the AO cannot in terms of Explanation 1(f) to Sec.115JB(2) to the Act, add the sum determined as disallowance u/s. 14A of the Act while computing total income under the normal provisions of the Act and he has to adopt a basis as laid down by the Special Bench in the aforesaid decision viz., direct expenditure associated with earning of income. The grievance of the revenue in this appeal as projected in ground No.2 is that the CIT(A) ought to have followed the decision in the case of

DCIT Vs. Sobha Developers (supra) rendered by ITAT Bangalore Bench wherein it was held that the disallowance u/s.14A of the Act made while computing total income under the normal provisions of the Act can also be adopted while determining book profits u/s.115JB in terms of Explanation-1(f) to Sec.115JB(2) of the Act. The ratio laid down in the said decision of the Bangalore Bench has not been approved by a full bench (Special Bench) of ITAT Delhi in the case of *Vireet Investments (supra)*, which decision was rendered after the decision rendered by the Bangalore Bench of ITAT. As far as the grievance of the revenue projected in Gr.No.3 is concerned, the subject matter of the impugned order is only as to, whether there was a mistake apparent from the record in the order of CIT(A) dated 2.4.2019 and not the issue whether not making addition of disallowance u/s.115JB(2) explanation-1(f) of expenses incurred to earn income which is exempt u/s.10 is a mistake apparent from the record or not. In other words, the issue sought to be raised by the revenue in ground No.3 can arise only in an appeal against the order dated 2.4.2019 and not in an appeal against the impugned order.

13. For the reasons given above, we find no merit in this appeal and accordingly the same is dismissed.

Pronounced in the open court on this 24th day of June, 2020.

Sd/-
(B R BASKARAN)
ACCOUNTANT MEMBER

Sd/-
(N V VASUDEVAN)
VICE PRESIDENT

Bangalore,
Dated, the 24th June, 2020.

/Desai S Murthy/

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.