

आयकर अपीलीय अधिकरण “एच” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“H” BENCH, MUMBAI

माननीय श्री महावीर सिंह, उपाध्यक्ष एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON’BLE SHRI MAHAVIR SINGH, VP AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM
(Hearing Through Video Conferencing Mode)

आयकरअपील सं./ I.T.A. No.7463/Mum/2016
(निर्धारण वर्ष / Assessment Year: 2012-13)

K. Raheja Corp. Private Ltd. Raheja Tower Plot No.C-30, G Block Opp. SIDBI, Bandra Kurla Complex Bandra East, Mumbai-400 051	बनाम/ Vs.	DCIT-CC-4(2) Mumbai.
स्थायीलेखासं. /जीआइआरसं. /PAN/GIR No. AAACP-0522-B		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	Shri Percy Pardiwala (Ld. Sr. Counsel) & Ms. Aarati Sathe (Ld. AR)
Revenue by	:	Shri Jayant Jhaveri-Ld.CIT-DR

सुनवाई की तारीख/ Date of Hearing	:	04/03/2021
घोषणा की तारीख / Date of Pronouncement	:	03/05/2021

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by assessee for Assessment Year [in short referred to as ‘AY’] 2012-13 contest the order of Ld. Commissioner of Income-Tax (Appeals)-52, Mumbai, [in short referred to as ‘CIT(A)’], Appeal No. CIT(A)-52/IT/DC-CC-4(2)/300/2015-16 dated 30/09/2016 on following grounds: -

1. On facts and circumstances of the case and in law, the learned CIT (Appeals) erred in confirming the action of the Assessing Officer in disallowing Rs.31,43,96,143/- by invoking the provisions of section 14A of the Act and computing the amount of disallowance as per Rule 8D of the Income Tax Rules, 1962 without appreciating the submission of the appellant.
2. On facts and circumstances of the case and in law, the learned CIT (Appeals) erred in confirming the action of the Assessing Officer in not allowing depreciation of Rs.4,00,64,233/- claimed during assessment proceedings.

The assessee, vide petition dated 12/02/2020, has filed an additional grounds of appeal wherein assessee seek exclusion of disallowance u/s 14A while computing Book Profits u/s 115JB. Since, this ground is merely an extension of main ground no.1 and do not require consideration of new facts and therefore, the same is taken on record as ground no.3. The same read as under: -

3. On the facts and circumstances of the case and in law, the learned AO & learned CIT (Appeals) erred in making disallowance under section 14A of Rs.31,43,96,143/- while computing book profit under section 115 JB of the Income Tax Act, 1961.

2. We have carefully perused the rival submissions and perused relevant material on record. The judicial pronouncements as cited during the course of hearing have duly been deliberated upon. The assessment orders passed in assessee's case for AYs 2013-14 & 2015-16 has been placed on record. Our adjudication to the subject matter of appeal would be as given in succeeding paragraphs. It is evident that there are two issues- (i) disallowance u/s 14A; (ii) Depreciation claim of Rs.400.64 Lacs.

3. The material facts are that the assessee being resident corporate assessee is stated to be engaged as Real estate developer. An assessment was framed for the year under consideration u/s 143(3) on 09/02/2015 wherein returned loss of Rs.309.18 Lacs was determined at income of Rs.2518.71 Lacs whereas returned Book Profits u/s 115JB for

Rs.834.84 Lacs was determined at Rs.4046.67 Lacs. While framing assessment, disallowance u/s 14A was made while computing income under normal provisions as well as while computing Book Profits u/s 115JB. The assessee made new depreciation claim during assessment proceedings, however, the same has been denied by Ld. AO since new claim could be made only by filing the revised return of income.

4. Disallowance u/s 14A

4.1 Since the assessee had opening and closing investments in shares for Rs.258.39 Crores & Rs.441.38 Crores respectively and the assessee debited interest expenditure of Rs.194.28 Crores, Ld. AO opined that disallowance u/s 14A would be attracted. The assessee earned exempt dividend income of Rs.73.22 Lacs but did not offer any suo-moto disallowance in the statement of income. The assessee defended its stand by submitting that no part of interest qualify for disallowance since it was the finding of Tribunal in earlier years (AYs. 1994-95 to 2007-08) that the assessee had surplus interest free funds to make these investments. Another plea was that no amount was to be disallowed on investment of Rs.396.10 Crores since no dividend was earned from those investments.

4.2 However rejecting the same, Ld. AO invoked the provisions of Rule 8D and worked out aggregate disallowance of Rs.3143.96 Lacs which comprised-off of interest disallowance u/r 8D(2)(ii) for Rs.2969.01 Lacs and indirect expense disallowance u/r 8D(2)(iii) for the balance amount. The said disallowance was added to normal income as well as while computing Book Profits u/s 115JB.

4.3 Before Ld. CIT(A), the assessee relied upon the findings of Tribunal in earlier years that interest free funds far exceeded the investments and

therefore, a presumption could be drawn that investments were out of those funds. Further, no part of interest could be attributed towards investment in shares.

4.4 However, Ld. CIT(A) noted that there were fresh investments of Rs.183 Crores in group concerns during the year and the interest expenditure was higher by over Rs.55 Crores in comparison to preceding year. Therefore, part of the interest was incurred towards fresh investment of Rs.183 Crores. This being so, the disallowance would be attracted. Further, in terms of CBDT Circular No. 5 of 2014 dated 11/02/2014, the disallowance would be made even if no exempt income was earned by the assessee during the year. The assessee made fresh investments of Rs.183 Crores and could not establish that the investments were out of free funds available with the assessee. Therefore, the facts for this year vis-à-vis earlier years were distinguishable. Accordingly, the disallowance was confirmed. Aggrieved, the assessee is in further appeal before us.

5. Upon careful consideration, we find that it is undisputed fact that the Tribunal, in assessee's own case for earlier AYs 1994-95 to 2007-08, rendered a finding that the assessee had surplus interest free funds to make the investments. In AY 2008-09, ITA No.6900/Mum/2011 order dated 04/04/2016, the coordinate bench has rendered similar findings. Similar view has been expressed in Tribunal order for AY 2009-10, ITA No.366/Mum/2013 order dated 08/09/2016. In the said order, the issue of expense disallowance u/r 8D(2)(iii) has been set aside for de-novo computation with certain direction. Similar view has been taken in Tribunal order for AY 2010-11, ITA No.1004/Mum/2015 order dated 16/08/2019. In this order, the matter of disallowance u/r 8D (2)(iii), under

normal income, has been restored back with a direction to consider only those investments which have yielded exempt income to the assessee. The matter of adjustment of disallowance u/s 14A while computing Book Profits u/s 115JB has been restored back with following directions: -

5.2 With regard to disallowance made u/s 14A of the Act, while computing book profits u/s 115JB of the Act, we find that the computation mechanism provided in rule 8D(2) of the rules cannot be imputed into clause (f) to Explanation 1 to Section 115JB(2) of the Act as held by the Special Bench of Delhi Tribunal in the case of Vireet Investment (P) Ltd. reported in 165 ITD 27. However, the Id. AO is directed to consider the disallowance of expenses incurred for the purpose of earning exempt income based on actual amounts debited to profit & loss account. This directions is also given in the light of the decision of Special Bench of Delhi Tribunal supra. Accordingly, the additional ground raised by the assessee is allowed for statistical purposes.

In AY 2011-12, ITA No.6002/Mum/2016 order dated 10/01/2018, interest disallowance has been deleted by the coordinate bench whereas expense disallowance has been estimated at Rs.5 Lacs.

6. We find that, so far as the source of investment up-to AY 2011-12 is concerned, it is the consistent finding of the Tribunal that the assessee had surplus interest free funds to make the investments. As per the observation of Ld. CIT(A), there are fresh investment of Rs.183 Lacs during the year which could be said to have been sourced out of borrowed funds. However, we find that no such nexus has been established by Ld. AO during assessment proceedings. Another pertinent fact is that own interest free funds far exceeds the investments made by the assessee and therefore, the presumption as drawn in earlier years would still prevail that the investments were sourced out of interest free funds and not out of borrowed funds unless the nexus between the two was established and brought on record by Ld. AO. In the absence of such nexus, the interest disallowance would not be

sustainable in law. Therefore, on the facts the circumstances of the case, we are inclined to delete the interest disallowance made u/r 8D(2)(ii). So far as expenses disallowance u/r 8D(2)(iii) is concerned, Ld.AO is directed to re-compute the same after considering only those investments which have yielded exempt income during the year.

7. So far as the adjustment of disallowance u/s 14A while computing book profits u/s 115JB is concerned, the matter would stand restored back to the file of Ld. AO on similar lines as directed by Tribunal in order for AY 2010-11, ITA No.1004/Mum/2015 order dated 16/08/2019. The operative portion has already been extracted by us in preceding paragraphs.

8. Consequently, these grounds stands partly allowed to the extent indicated in the order.

9. Depreciation Claim

9.1 During assessment proceedings, the assessee submitted that it missed out depreciation claim of Rs.400.64 Lacs on assets given on finance lease. The claim was rejected By Ld. AO since the new claim could be made only by revising the return of income as per decision of Hon'ble Apex Court in **Goetz (India) Ltd. vs. CIT (284 ITR 323)**. Another observation was that these leased assets did not form part of business assets for the assessee and therefore, not eligible for depreciation. No such under claim of depreciation was reported by Tax Auditor.

9.2 The Ld. CIT(A) noted that the assessee had installed certain assets in the nature of DG sets, HVAC chillers etc. at its premises which was leased along with the premises. The assessee company charged separate maintenance fees for providing these assets which was offered as Business Income. However, the assessee did not claim depreciation

on these assets in the return of income. The assessee, on the strength of documentary evidences, controverted the finding of Ld. AO that these assets did not form part of business assets. It was submitted that there was specific charge for these assets in the agreement and the income so earned was offered as well as assessed as 'Business Income'. The mistake of not claiming the depreciation was realised during the year and the Tax Auditor while finalizing the Tax Audit Report for AY 2013-14 incorporated these assets at opening WDV. The certificate of tax auditor was also furnished. Accordingly, the claim was allowable in terms of Section 32 of the Act.

9.3 However, Ld. CIT(A) observed that these assets did not form part of the schedule of fixed assets of the assessee and there was no way in which the assessee could claim depreciation on such assets later on. The assessee could not produce requisite certificate of Tax Auditor during assessment proceedings. The certificate submitted during appellate proceedings was new evidence which could not be admitted unless it was shown that non-furnishing of the same was beyond the control of the assessee. Even otherwise, the certificate did not explain as to why the depreciation was not claimed in earlier years. An observation was made in para-20 that there was no separate agreement for these assets but it was a part of overall lease deed. Therefore, the income should have been assessed as 'Income from House property'. In such a case, the assessee would not be eligible to claim depreciation but only standard deduction of 30%. The Ld. AO may examine these facts in accordance with the law and may take appropriate action. However, in the next para (also numbered as 20), the claim made by the assessee was rejected. Aggrieved, the assessee is in further appeal before us.

9.4 The Ld. Sr. Counsel, inter-alia, submitted that the income from the leased assets was specifically mentioned in the respective agreements and the same has been offered as well as assessed as 'Business Income'. This being the case, the assessee would be eligible for the depreciation. Our attention has been drawn to the fact that the depreciation on these asset has been allowed in subsequent years while framing assessment u/s 143(3).

10. Upon due consideration of factual matrix, finding strength in arguments of Ld. Sr. Counsel, we are of the considered opinion that correct factual matrix is required to be brought on record. Needless to add that if the income has been offered and assessed as 'Business Income', the assessee would be eligible to claim the depreciation. Therefore, the impugned order, on this issue is set-aside and the issue is restored back to the file of Ld. AO for fresh adjudication after appreciating the correct facts. The assessee is directed to substantiate its claim with documentary evidences. The ground stand allowed for statistical purposes.

Conclusion

11. The appeal stand partly allowed.

Order pronounced on 3rd May, 2021.

Sd/-

(Mahavir Singh)

उपाध्यक्ष / Vice President

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 03/05/2021
Sr.PS, Jaisy Varghese

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.