

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

ITA No. 04/2016

c/w

ITA No. 14/2016.

ITA No. 13/2016

Date of order: 18.04.2018

Pr. Commissioner of Income Tax

Vs.

The Jammu Central Coop. Bank Ltd.

Coram:

Hon'ble Mr Justice Ramalingam Sudhakar, Chief Justice (Acting)

Hon'ble Mr Justice Sanjeev Kumar, Judge.

Appearance:

For the Appellant(s) : Mrs. Aruna Thakur, Advocate.

For the Respondent(s) : Mr. Inder Jeet Gupta, Advocate.

i) Whether approved for reporting in Law journals etc.: Yes/No

ii) Whether approved for publication in press: Yes/No

1. The three appeals filed by the Revenue had been admitted on the following questions of law:-

(i) Whether on facts and circumstances of the case, the Hon'ble ITAT Amritsar was right in not following the Circular No. 5/2014 of CBDT, New Delhi dated 11.02.2014 wherein the intention of the legislature was clarified.

(ii) Whether on the facts and circumstances of the case the Hon'ble ITAT Amritsar was right in law in discounting the applicability of decision of Special Bench of the Hon'ble ITAT, Mumbai in the case of ITO Vs. Daga Capital Management (P) Krsd, (2009) 312 ITR (AT) (Mumbai) (SB) to the present case which held

that retrospective effect can be given to Rule 8D of the Income Tax Rules.

2. The same questions of law apply to all the three cases. The assessment years in relation to these appeals are as follows:-

1. ITA No. 14/2016-Assesment year 2004-05.
2. ITA No. 04/2016-Assessment Year 2005-06.
3. ITA No. 13/2016-Assesment Year 2006-07.

3. The respondent is a Cooperative Bank. In all these three assessment years, assessment was completed under Section 143(3) of the Income Tax Act on various dates. However, the case was reopened in terms of Section 147 of the Income Tax Act and the reason for reopening the same as set out in one of the Assessment order is as follows:-

“During the period under reference, assessee had made investment in shares and Bonds at Rs. 23,59,48,000/- + Rs. 18,70,66,010/- + Rs. 2,38,13,000/- totalling to Rs. 44,68,28,010/-. The dividend income on this investment is exempt from tax. The assessee had paid interest on borrowed capital, while on the other side the assessee has used funds in investments, dividend income wherefrom is exempt from tax. Thus proportionate interest needs to be disallowed u/s 14A. Hon’ble Special bench of I.T.A.T Mumbai had held in the case of M/s Daga Capital Management Service Ltd., that provision of Rule 8D is applicable retrospectively, being a procedural provision. Hence, disallowance u/s 14A in this case is computed under Rule 8D as under:-

Disallowance of u/s 14A = $27,74,25,117 \times \frac{\text{Investment as on 1.4.2004} + \text{Investment as on 31.03.2005}}{\text{Total Assets as on 1.4.2004} + \text{Total assets as on 31.03.2005}} \times \frac{1}{2} \% \text{ of average Investment}$

$$\begin{aligned}
 &= 27,74,25,117 \times \frac{1,14,44,26,620 + 58,18,27,020}{6,31,36,01,492 + 6,53,06,40,666} \times \frac{1}{2} \% \text{ of } 1,14,44,26,620 + 58,18,27,020 \\
 &= 27,74,25,117 \times \frac{1,72,62,53,640}{12,84,42,42,158}
 \end{aligned}$$

+ 1/2 % of (86,31,26,820)

=3,72,85,665+43,15,634

=4,16,01,299

Thus disallowance u/s 14A was required to be made at Rs. 4, 16, 01, 299/- which had not been made at the time of framing of the assessment. Accordingly, I have reason to believe that income of Rs. 4,16,01,299/- has escaped assessment.”

4. The Assessing Officer (AO) after getting an explanation from the Assessee proceeded to hold that the disallowance is to be worked out in terms of Section 14A read with Rule 8D of the Income Tax Rules, 1962 with the consequential proceeding of penalty etc.

5. Aggrieved by that, against all the three orders of assessment, the appeals were filed before the Commissioner Income Tax who allowed all the appeals of the assessee holding that the application under Section 14A in the facts of the assessee's case does not arise and as a result, the question of invoking Rule 8D of the Income Tax Rules does not arise and held as under:-

“ I have considered the rival submissions and find that the additions/disallowance of interest not attributable to the business income is unjustified for the following reasons:

- 1. There is no dividend income earned by the appellant hence the application of sec 14A is misdirected. The appellant has furnished a chart showing investment in Government of India securities, State Government Development securities, NABARD Bonds, J&K S.F.C Bonds and IDBI and SIDBI Bonds. The interests earned on these bonds have been offered for taxation.**
- 2. The application of rule 8D is not in order as it came into effect w.e.f 14.02.2007.**
- 3. The AO in the subsequent assessment year 2008-09 accepted the plea of the appellant in an assessment u/s 143(3) and no such disallowance was made.”**

6. The revenue pursued the matter before the Tribunal and contested the same contending that the Commissioner CIT appeals should have followed the ratio of the decision of the Mumbai Special Bench Tribunal in ITO Vs. Daga Capital Management (P) Ltd. (2009) 312 ITR (AT) (Mumbai) (SB) pleading that proportionate interest earned on dividend income needs to be disallowed under Section 14A of the Act & Rule 8D of the Income Tax Rules with the further plea that Rule 8D operates retrospectively. The Tribunal taking note of the factual findings of the CIT appeals rejected the department appeal in paragraph Nos. 11 & 12 as follows:-

“11. In this regard, there is no denial to the decision of the Special Bench of the Tribunal (Supra). However, the applicability thereof has not been established by the department, since there is no effective rebuttal to the finding of the Id. CIT(A) that the provisions of section 14A of the Act do not come into play, since the assessee has specifically stated of not having earned any dividend income in any of the three years under consideration and this contention remains undisputed. Now, whereas the provisions of section 14A of the Act are themselves not attracted and inapplicable, there is no question of applying the provisions of Rule 8D of the Rules to the case of the assessee in any of the A.Ys.

12. For the above discussion, the grievance of the department is found to be shorn of merit and is rejected as such. The appeals of the department for all the three A.Ys are dismissed.”

7. The revenue has, therefore, filed the appeals in all the three cases pleading that in terms of the Tribunal's Special Bench order in ITO Vs. Daga Capital Management (P) Ltd, the order of the assessing officer should be restored and also pleaded on the question of law that Rule 8D of the Income Tax Rules operates retrospectively.

8. The issue raised in the present appeal was considered by the Bombay High Court in the case of **Commissioner of Income Tax Vs. M/S Essar Teleholdings Ltd. Through its Manager**, wherein the scope of Section 14A read with Rule 8D of the Income Tax Rules was considered.

9. The Bombay High Court ruled that Rule 8D is prospective. The revenue pursued the matter before the Hon'ble Supreme Court. The question that arose for consideration before the High Court as well as the Apex Court is as follows:-

“Whether on the facts and circumstance of the case and in law, the Hon'ble ITAT is right in holding that applicability of Rule 8D is only prospective in operation and for the year under assessment it was not applicable?”

10. This issue was answered by the Apex Court in Paragraph 45 to 51 of the Judgment passed by the Hon'ble Supreme Court in the case of **Commissioner of Income Tax 5 Mumbai (Supra)**.

“45. As noted above, that Rule 8D has again been amended by Income Tax (Fourteenth Amendment) Rules, 2016 w.e.f. 02.06.2016, by which Rule 8D sub-rule (2) has been substituted by a new provision which is to the following effect:

[(2) The expenditure in relation to income which does not form part of the total income shall be the aggregate of following amounts, namely:-

(i) The amount of expenditure directly relating to income which does not form part of total income; and

(ii) The annual average of the monthly averages of the opening and closing balances of the value of investment, income from which does not or shall not form part of total income.

Provided that the amount referred to in clause (i) and clause (ii) shall not exceed the total expenditure claimed by the assessee.]

46. The method for determining the amount of expenditure brought in force w.e.f. 24.03.2008 has been given a go bye and a new method has been brought into force w.e.f. 02.06.2016, by interpreting the Rule 8D retrospective, there will be a conflict in applicability of 5th & 14th Amendment Rules which clearly indicates that the Rule has a prospective operation, which has been prospectively changed by adopting another methodology.

47. One of the submissions raised by the learned counsel for the assessee also needs to be noticed. Learned counsel for the assessee submits that it is well settled that subordinate legislation ordinarily is not retrospective unless there are clear indication to the same. Reliance has been placed on judgment of this Court in State of Jharkhand & Ors. Vs. Shiv Karampal Sahu (2009) 11 SCC 453. In para 17 following has been stated:

“17. Ordinarily, a subordinate legislation should not be construed to be retrospective in operation. The Circular Letter dated 7-5-2003 was given a prospective effect. The father of the respondent died on 19-5-2000. There is nothing to show that even Circular dated 9-8-2000 had been given retrospective effect. In any view of the matter, as the State of Jharkhand in the Circular Letter dated 7-5-2003 adopted the earlier circular letters issued by the State of Bihar only in respect of cases where death had occurred after 15-10-2000 i.e. date from which the State of Jharkhand came into being, the High Court, in our opinion, committed a serious error in giving retrospective effect thereto indirectly which it could not do directly. Reasons assigned by the High Court, for the reasons aforementioned, are unacceptable.”

There is no indication in Rule 8D to the effect that Rule 8D intended to apply retrospectively.

48. Applying the principles of statutory interpretation for interpreting retrospectivity of a fiscal statute and looking into the nature and purpose of sub-section 2 & Sub-section (3) of Section 14A as well as purpose and intent of Rule 8D coupled with the explanatory notes in the Finance Bill, 2006 and the departmental understanding as reflected by Circular dated 28.12.2006, we are of the considered opinion that Rule 8D was intended to operate prospectively.

49. It is relevant to note that impugned judgment in this appeal relies on earlier judgment of Bombay High Court in

(ii) an amount equal to one per cent of the annual average of the monthly averages of the opening and closing balances of the value of investment, income from which does not or shall not form part of total income:

Provided that the amount referred to in clause (i) and clause (ii) shall not exceed the total expenditure claimed by the assessee.]

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Godrej and Boyce Manufacturing Company Limited versus Deputy Commissioner of Income Tax, Mumbai and Another, (2017) 7 SCC 421, where the Division Bench of the Bombay High Court after elaborately considering the principles to determine the prospectivity or retrospectivity of the amendment has concluded that Rule 8D is prospective in nature. Against the aforesaid judgment of the Bombay High Court dated 12.08.2010 an appeal was filed in this court which has been decided by vide its judgment reported in Godrej and Boyce Manufacturing Company Limited versus Deputy Commissioner of Income Tax, Mumbai and Another, (2017) 7 SCC 421. This Court, while deciding the above appeal repelled the challenge raised by the assessee regarding vires of Section 14A. In para 36 of the judgment this Court noticed that with regard to retrospectivity of provisions Revenue had filed appeal, hence the said question was not gone into the aforesaid appeal. In the above case, this Court specifically left the question of retrospectivity to be decided in other appeals filed by the Revenue. We thus have proceeded to decide the question of retrospectivity of Rule 8D in these appeals.

50. In view of our opinion as expressed above, dismissal of the appeal by the Bombay High Court is fully sustainable. As held above, the Rule 8D is prospective in operation and could not have been applied to any assessment year prior to Assessment Year 2008-09.

51. In result, all the appeals filed by the Revenue are dismissed.”

10. In the present case, as indicated by the A.O, the assessment orders in all the three cases has been made invoking Rule 8D for three assessment years indicated in para 2 of this judgment. In view of the Apex Court decision (supra), more particularly Paragraph 50, that the said provision cannot be applied to any assessment year prior to Assessment Year 2008-09, the department plea has to fail. Hence, no question of law arises in all the three cases for the aforesaid reasons. Accordingly, all the three appeals are dismissed.

(Sanjeev Kumar)
Judge

(Ramalingam Sudhakar)
Chief Justice(Acting)

Jammu
18.04.2018
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