

G.A no.1150 of 2015  
ITAT no.52 of 2015  
IN THE HIGH COURT AT CALCUTTA  
Special Jurisdiction (Income Tax)  
ORIGINAL SIDE

Commissioner of Income Tax, Kolkata-2

Versus

M/s. G K K Capital Markets (P) Limited

BEFORE:

The Hon'ble JUSTICE ANIRUDDHA BOSE

The Hon'ble JUSTICE ARINDAM SINHA

Date:10<sup>th</sup> February, 2017.

Ms. Gutgutia, Adv.

..for the Revenue.

Mr. Khaitan learned Sr. Adv.

..for the Assessee.

Arindam Sinha, J: The Revenue seeks to prefer appeal against order dated 14<sup>th</sup> October, 2014 passed by the Income Tax Appellate Tribunal "B" Bench, Kolkata in ITA no.805/KOL/2012 pertaining to the assessment year 2008-09.

Ms.Gutgutia learned advocate appeared on behalf of the Revenue and submitted that in the computation of total income the assessee had claimed Rs.25,68,04,353/- as long term capital gain being exempt income. Applying Rule 8D the Assessing Officer had computed disallowance under Section 14A the Income Tax Act, 1961 but the Tribunal had erred in law in deleting this disallowance.

She handed up a calculation sheet detailing the manner in which calculation is made of disallowable expenditure by application of Rule 8D (i), (ii) and (iii). The sheet also contains such calculation made in respect of the assessee. That portion of the calculation is reproduced below:

"Re - G K K Capital Markets (P) Limited Assessment Year 2008-09 LTCG claimed; treated as business income - Rs.25,80,33,811/-

	Tax -30% <u>Rs.</u>
<u>7,74,10,143/-</u>	
14A by Assessee	Rs.8,83,49,955/-
assessee's offer	<u>Rs. 37, 28, 966/-</u>
u/s 8D (ii)	
8D (iii)	<u>Rs.8,46,20,989/-</u>

Rs.2,53,86,296/- "

She then relied on a decision of this court in the case of **Dhanuka & Sons vs. CIT** reported in (2011) 12 taxmann.com 227 (Cal) in particular to paragraphs 6 to 9 as are reproduced below:

"6.Mr. Sarkar, the learned advocate appearing on behalf of the revenue, has, on the other hand, supported the order passed by the Tribunal and has contended that the assessee itself having failed to produce material in support of its contention, the Assessing Officer rightly assessed the deductible income on proportionate basis. Mr. sarkar submits that the same is in conformity with Rule 8D of the Income tax Rule and thus, we should not interfere with the order passed by the Tribunal.

7. After hearing the learned counsel appearing for the parties and after going through the materials on record and the decisions cited by Mr. Khaitan, we find that the Supreme Court in the cases of CIT v.

*Maharashtra Sugar Mills Ltd. [1971] 82 ITR 452 and Rajasthan State Warehousing Corpn. V. CIT [2000] 242 ITR 450/109 Taxman 145 having held that where there is one indivisible business giving rise to taxable income as well as exempt income, the entire expenditure incurred in relation to that business would have to be allowed even if a part of the income earned from the business is exempt from tax, section 14A of the Act was enacted to overcome those judicial pronouncements. The object of section 14A of the Act is to disallow the direct and indirect expenditure incurred in relation to income which does not form part of the total income.*

*8. In the case before us, there is no dispute that part of the income of the assessee from its business is from dividend which is exempt from tax whereas the assessee was unable to produce any material before the authorities below showing the source from which such shares were acquired,. Mr. Khaitan strenuously contended before us that for the last few years before the relevant previous year, no new share has been acquired and thus, the loan that was taken and for which the interest is payable by the assessee was not for acquisition of those old shares and, therefore, the authorities below erred in law in giving benefit of proportionate deduction.*

*9. In our opinion, the mere fact that those shares were old ones and not acquired recently is immaterial. It is for the assessee to show the source of acquisition of those shares by production of materials that those were acquired from the funds available in the hands of the assessee at the relevant point of time without taking benefit of any loan. If those shares were purchased from the amount*

taken in loan, even for instance, five or ten years ago, it is for the assessee to show by the production of documentary evidence that such loaned amount had already been paid back and for the relevant assessment year, no interest is payable by the assessee for acquiring those old shares. In the absence of any such materials placed by the assessee, in our opinion, the authorities below rightly held that proportionate amount should be disallowed having regard to the total income and the income from the exempt source. In the absence of any material disclosing the source of acquisition of shares which is within the special knowledge of the assessee, the assessing authority took a most reasonable approach in assessment."

She also relied on CBDT Circular no.5/2014 dated 11<sup>th</sup> February, 2014, in particular to paragraphs 4 and 6 therein which are set out below:

"4. The above position is further clarified by the usage of term 'includible' in the Heading to section 14A of the Act and also the Heading to Rule-8D of I.T. Rules, 1962 which indicates that it is not necessary that exempt income should necessarily be included in a particular year's income, for disallowance to be triggered. Also, section 14A of the Act does not use the word "income of the year" but "income under the Act". This also indicates that for invoking disallowance under Section 14A, it is not material that assessee should have earned such exempt income during the financial year under consideration.

6. Thus, in light of above, Central Board of Direct Taxes, in exercise of its powers under section 119 of the Act hereby clarifies

that Rule 8D read with section 14A of the Act provides for disallowance of the expenditure even where taxpayer in a particular year has not earned any exempt income."

The questions suggested by the Revenue are as follows:-

"i) Whether on the facts and in the circumstances of the case the Learned Tribunal erred in law and was not justified in allowing the appeal filed by assessee in deleting the disallowance under Section 14A computed in accordance with Rule 8D of the Income Tax Act, 1961.

ii) Whether on the facts and in the circumstances of the case the Learned Tribunal erred in law and was not justified in law in holding investments as shares stock in trade?

iii) Whether on the facts and in the circumstances of the case the Learned Tribunal erred on facts as well as in law in holding that disallowance of Rs.8,83,49,955/- under Rule 8(D) was not warranted, ignoring the decisions on the issue and Circular no.5/2014 issued by CBDT, which provides that disallowance under Section 14A can be invoked even if no exempt income was received from the investment in any particular period?

iv) The order impugned is liable to be set aside as the same is passed against the applicable law and without appreciation of facts.

v) Whether on the facts and in the circumstances of the case the Learned Tribunal erred in law as it allowed the appeal filed by assessee and there is perversity for non consideration of materials facts on record transpired after the detailed enquiry made by Assessing Officer and the same ought to be set aside?"

Mr. Khaitan, learned senior Advocate appeared on behalf of the assessee and demonstrated from the assessment order that the Assessing Officer had treated the claim of long term capital gain as business income. The assessee did not object to that. In such situation there could be no application of Section 14A for disallowance of expenditure incurred to earn exempt income.

He submitted the assessee is engaged in the business of share trading. Money was borrowed for the purpose of purchasing shares. The expenditure of interest on borrowings was relatable to the share trading business. The shares had been taken as stock in trade of the assessee which yielded dividend income. There was no expenditure incurred in earning the dividend income which is only incidental to the assessee holding on to the shares. He relied on an **unreported judgment** dated 28<sup>th</sup> February, 2012 of the High Court of Karnataka in the case of **CCI Ltd. vs. JCIT** in which the substantial question of law that arose was whether the provisions of Section 14A of the Act are applicable to expenses incurred by the assessee in the course of its business merely because the assessee is also having dividend income when there was no material brought to show that the assessee had incurred expenditure for earning dividend income which is exempted from taxation. The said substantial question of law was answered in favour of the assessee and against the Revenue. Nevertheless, he submitted, the assessee in this case had not disputed the expenditure of Rs.37,28,966/- disallowed as per Rule 8D on account of dividend income. Since no other exempt income had been allowed by the Assessing Officer, disallowance of further expenditure as concurrently deleted by the CIT and the Tribunal was

incorrectly done since Section 14A had no application to the rest of the share trading income of the assessee, the same having been treated as business income.

He submitted further, in any event the Assessing Officer did not record reasons to show that any expenditure by way of interest during the previous year was not directly attributable to the share trading income. Thus, there could be no application of Rule 8D(2)(ii).

He drew attention to paragraph 5 of the impugned order to submit that the Tribunal had accepted the submission of the assessee that there was no satisfaction recorded by the Assessing Officer for invoking the provisions of Section 14A read with Rule 8D. The Tribunal had said so in the case of **CIT V. REI Agro Ltd.** and this court by its order dated 23<sup>rd</sup> December, 2013 dismissed the appeal preferred therefrom by the Revenue. He submitted further, the said circular relied upon by the Revenue also had no application to the facts of this case.

We find from the assessment order the Assessing Officer said, inter alia, as follows:-

*"In the computation of total income, the assessee has claimed LTCG of Rs.25,58,04,353/- as exempt. Since Long Term Capital Gain of Rs.25,80,33,811/- is treated as business income, no such exemption is allowed."*

The Tribunal in the impugned order had found that the assessee does not have any investment and all the shares are held as stock in trade as is evident from the orders of the lower authorities. On those facts the Tribunal held:-

*"Once, the assessee has kept the shares as stock in trade, the rule 8D of the Rules will not apply."*

In **Dhanuka & Sons** (supra) it was found there was no dispute that part of the income of the assessee from its business was from dividend whereas the assessee was unable to produce any material before the authority below showing the source from which such shares were acquired. That decision is distinguishable on facts as not applicable to this case. We also do not find the Revenue had urged that the expenditure being disallowed was in relation to exempt income not arising in the previous year for application of the said circular to be considered. The Assessing Officer had accepted the correctness of the disallowable expenditure offered by the assessee on its claim of Rs.25,68,04,353/- as long term capital gain. He did not allow the claim itself treating the said amount as business income to thereafter disallow the offered expenditure.

In view of the clear finding of fact regarding the exempt income claimed treated to be business income and the shares held by the assessee having been treated as stock in trade, we do not find the case involves a substantial question of law. The application and appeal are thus dismissed.

(Aniruddha Bose, J.)

(Arindam Sinha, J.)