

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD “ B ” BENCH – AHMEDABAD

Before Shri Rajpal Yadav, JM & Shri Manish Borad, AM.

ITA No. 161/Ahd/2012
Asst. Year: 2009-09

Shailesh Kantilal Dora, Paras Society, Palitana, Bhavnagar	Vs.	ACIT, Circle-2, Bhavnagar.
Appellant		Respondent
PAN ACOPD 6530C		

AND

ITA No. 533/Ahd/2012
Asst. Year: 2009-09

ACIT, Circle-2, Bhavnagar.	Vs.	Shailesh Kantilal Dora, Paras Society, Palitana, Bhavnagar
Appellant		Respondent

Appellant by	Shri B. R. Popat, AR
Respondent by	Shri James Kurien, Sr. DR

Date of hearing: 27/9/2016
Date of pronouncement: 11/11/2016

O R D E R

PER Manish Borad, Accountant Member.

These cross appeals by assessee and Revenue for Asst. Year 2008-09 are directed against the order of Id. CIT(A) –XX, Ahmedabad, dated 9.12.2011 vide appeal no.CIT(A)-XX/476/10-11 arising out of order u/s 143(3) of the IT Act, 1961 (in short the Act) framed on 22.12.2010 by ACIT, Circle-2, Bhavnagar.

2. Briefly stated facts are that assessee is an individual running three proprietary concerns and engaged in the business of construction and undertook certain projects during the year. Return of income was filed on 15.07.2008 declaring total income at Rs.9,45,790/-. Case was selected for scrutiny and notice u/s 143(2) of the Act followed by notice u/s 142(1) of the Act. Necessary details were called for and written submissions were filed and books of accounts produced. Income was assessed at Rs.1,37,01,455/- after making addition of Rs.1,27,35,355/-. Assessee got part success in appeal before the first appellate authority.

3. Aggrieved, assessee and Revenue both are in appeal before the Tribunal.

4. First we take up assessee's appeal in ITA No.161/Ahd/2012 raising two issues against CIT(A)'s order (a) confirming addition of Rs.5,00,000/- made by Assessing Officer by invoking section 68 of the Act and (b) confirming disallowance of Rs.15,42,771/- made u/s 14A of the Act r.w.r. 8D of the IT Rules, 1962(in short the Rules).

5. As regards ground no.1 wherein assessee is aggrieved with the CIT(A)'s order confirming addition of Rs.5,00,000/- made by Id. Assessing Officer u/s 68 of the Act. Ld. AR submitted that the assessee made payment of Rs.5,60,500/- way back before 15 years for acquiring rights for a piece of land situated at S.No.45, Hissa No.23 admeasuring 2350 sq.m. situated at Nandivali Gam in

Dombivali (East) of District Thane in the State of Maharashtra. This sum of Rs.5,60,500/- was very much reflected under the account head "land at Survey No.45" in the books of Account and regularly being carried forward for last so many years. The rights of this piece of land were to be acquired from one Mohan Krushna Bhoire to whom payment was made at that relevant point of time.

6. Ld. AR further submitted that due to certain litigation in connection with this piece of land assessee was not in a possession to get the conveyance deed registered in his name. In the F.Y. relevant to Asst. Year 2008-09 assessee accordingly deemed it necessary to get all the rights of this plot but was unable to recover from the land owner and thereafter efforts were made with one concern M/s Panna Enterprise who agreed to take over the rights over the said plot and paid Rs.5,00,000/- by way of two account payee cheques of Rs.2,50,000/- each. However, since the transactions were carried out with M/s Panna Enterprise, it was only in the stage of negotiation and was yet to take final shape net loss of Rs.60,500/- amount paid (Rs.5,60,500/- - Rs.5,00,000) was not claimed as loss in the income tax return.

7. Ld. AR further submitted that Id. Assessing Officer erred in invoking provisions of section 68 of the Act even when the impugned amount was received by account payee cheques along with covering letter given by M/s Panna Enterprise and also Id. Assessing Officer ignored the fact that assessee has been regularly showing advance

of Rs.5,60,500/- in its balance sheet attached with the return of income.

8. On the other hand, Id. DR vehemently argued and supported the order of Id. CIT(A) wherein ground of the assessee was dismissed by observing as follows :-

4.2 I have considered the submissions made by the A. R. of the appellant and the observations of the assessing officer in the assessment order. As seen from para-6 of the assessment order, AO observed that the sum of Rs.5 lakhs was found credited in the bank account of the appellant. The explanation filed by the appellant was cryptic and without any supporting evidence. During the course of appellate proceedings, it was contended that the said sum was received from M/s. Panna Enterprise towards the settlement of rights over the disputed land. In support thereof, letter dated 10-01-2011 from Panna Enterprise confirming the payment of said amount was filed. However, appellant failed to explain as to why the said explanation/evidence was not furnished before the AO. As seen from the written submissions filed, no request has been made for admission of additional evidence on this issue. Therefore, I am of the view that no interference is called for. This ground of appeal is dismissed.

9. We have heard the rival contentions and perused the record. Through this ground assessee is aggrieved with the order of CIT(A) confirming the addition u/s 68 at Rs.5,00,000/-. From going through the submissions of Id. AR we observe that the amount of Rs.5,60,500/- stood as advance in the balance sheet since last many years being given to one Mr. Mohan Krushna Bhoire for acquiring rights over a piece of land situated at Nandivali Gam in Dombivali (East) of District Thane in the State of Maharashtra. Further we observe that after a lapse of around 15 years assessee is claiming that an amount of Rs.5,00,000/- (by way of two account payee crossed cheques of Rs.2,50,000/-) has been received from M/s Panna Enterprises who agreed to take over the rights of the said plot

of land when the assessee was unable to take over from Mr. Mohan Krushna Bhoire. We further observe that during the course of assessment proceedings assessee could not place any detail about the cheques received from M/s Panna Enterprises and it was only during the course of appellate proceedings before first appellate authority that assessee placed a certificate dated 10.1.2011 from M/s Panna Enterprises (as placed at page 157 of the paper book) to support his contentions that the amount of Rs.5,00,000/- has been received from M/s Panna Enterprise on behalf of Mr. Mohan Krushna Bhoire. However, Id. AR could not reply to the question posed by us about establishing connection with Mohan Krushna Bhoire with M/s Panna Enterprise and any documentary evidence to show that the amount was paid to Mohan Krushna Bhoire for acquiring rights over the impugned land. Assessee only tried to convince the first appellate authority by providing fresh evidence which is post dated the date of assessment order, which was not even entertained by the first appellate authority as no request was made for admission of additional evidence on this issue.

10. We, therefore, are of the view that Id. CIT(A) has rightly sustained the disallowance as assessee was unable to connect the transaction made 15 years back with Mohan Krushna Bhoire with the amount of Rs.5,00,000/- received from M/s Panna Enterprise. Therefore, we find no reason to interfere with the order of Id. CIT(A). We uphold the same. This ground of assessee is dismissed.

11. Now we take up ground no.2 of assessee's appeal which reads as under :-

2. Confirming the disallowance of Rs. 15,42,771/-, originally made by the AO by invoking the provisions of section 14A read with Rule 8D of the Income tax Rules 1962. On facts of the case, he ought to have appreciated that since the corresponding expenditure was not claimed as deduction at all, the question of invoking the provisions of section 14A so as to disallow the same clearly did not arise.

12. At the outset Id. AR submitted that Id. Assessing Officer erred in making disallowance and so was Id. CIT(A) in confirming the disallowance without appreciating the fact that assessee has not claimed any expenditure of interest against the taxable income. Id. AR referred to the paper book dated 29.4.2016 at page 5 showing capital account for FY 2007-08 and submitted that the interest of Rs.1,695,270.91 is a mere debit to the capital account and no deduction has been claimed under any head of income while computing total income. Id. AR further submitted the question of invoking provisions of sec.14A of the Act and applying method given in rule 8D of the Rules clearly did not arise in the case of assessee. In the given facts and circumstances there is no finding on record that assessee had in fact incurred some expenditure for earning exempt income which could not be segregated by any other mode. Id. AR referred and relied on the decisions of the Co-ordinate Bench Kolkata in the case of REI Agro Ltd. vs. DCIT (2013) 35 taxmann.com 404, and Co-ordinate Bench, Mumbai in the case of ITO vs. Reliance Share & Stock Brokers (P) Ltd. (2014) 51 taxmann.com 215 (Mumbai-Trib).

13. On the other hand, Id. DR supported the order of Id. CIT(A) wherein the disallowance was confirmed by observing as follows :-

6.2 I have considered the submissions made by the A. R. of the appellant and the observations of the assessing officer in the assessment order. At para-8 of the assessment order, AO observed that appellant received dividend of Rs,36,540/-which is exempt income and accordingly, he made the disallowance u/s.14A in -accordance with Rule 8D.

The contentions of the learned AR are that appellant did not incur any expenditure for earning the dividend income; AO did not come to any definite finding that expenditure was incurred for earning exempt income and without such satisfaction applying Rule 80 mechanically is not in accordance with law.

In this connection, it is seen that during, the assessment proceedings cryptic explanation in one line was furnished by the appellant. Even during the appellate proceedings, it is not the contention of the appellant that the investments earning exempt income were made out of own funds so as not to attract the provisions of section 14A, Therefore, impugned disallowance is upheld. This ground of appeal is dismissed.

14. We have heard the rival contentions and perused the record placed before us. Assessee is aggrieved with Id. CIT(A)'s order confirming disallowance of Rs.15,42,771/- by invoking provisions of section 14A of the Act r.w. Rule 8D of the Rules. We find that during the course of assessment proceeding Id. Assessing Officer observed that assessee has earned tax free dividend of 38,540/- and has incurred interest expenditure of Rs.16,95,270/- and assessee had also made average investment of Rs.3,68,27,320/-. Accordingly Id. Assessing Officer invoked provisions of section 14A of the Act and by applying rule 8D calculated disallowance at Rs.15,42,771/-. Further from going through the computation of income along with balance sheet and capital account placed at page 1 to 6 of the paper book dated 29.4.2016 we observe that assessee's main source of income is speculation, deeming profit u/s 44AD capital gain and income from

other sources. As per the capital account, we find that assessee has not claimed the interest expenditure of Rs.16,95,270/- against any taxable income and rather it is a mere debit to the capital account. Further provisions of section 14A of the Act can be invoked wherein expenditure has been allowed in relation to income which does not form part of the total income. More precisely section 14A(1) contemplates that no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income. In our view once the assessee falls under section 14A(1) of the Act then only the process starts for the determination of disallowance u/s 14A of the Act. However, in the given facts of the case we find that assessee has not claimed any expenditure at all under any head which can have an element in the nature of claiming expenditure against taxable income. No such specific finding has been recorded by the Revenue and, therefore, in these circumstances we are of the view that no disallowance is called for u/s 14A of the Act. We accordingly set aside the order of Id. CIT(A) and delete the disallowance of Rs. 15,42,771/- and allow the ground of assessee.

15. Now we take up Revenue's appeal raising solitary ground against the order of Id. CIT(A) deleting addition of Rs.76,50,000/- made u/s 69 of the Act.

16. Brief facts relating to this ground are that stock statement of shares as appearing in the books of account were examined and cross verification against the D'mat statement of F.Y.2007-08 was

made and thereafter some discrepancies were found in respect of shares of Unitech Ltd. Necessary reply was submitted by assessee showing complete details of Unitech shares purchased, pledged to other parties against loans taken, pledged shares received back as well as details of bonus shares received on the shares of Unitech Ltd. held by the assessee. However, Id. Assessing Officer observed that on 1.10.2007 that there was no net negative balance of 18,000 of equity shares accordingly taking the price at Rs.425/- per equity shares on 1.10.2007 and multiplying it with 18,000 Unitech shares an addition of Rs.76,50,000/- was made u/s 69 of the Act on account of unexplained investment when the issue came up before the first appellate authority the issue was decided in favour of assessee.

17. Aggrieved, Revenue is now in appeal before the Tribunal.

18. Ld. Dr supported the order of Assessing Officer but could not controvert to the finding given by CIT(A).

19. On the other hand, Id. AR vehemently argued supporting the order of CIT(A) and further referred the paper book at page 10 to 19 referring to the reconciliation of shares of Unitech transaction cum holding statement of Unitech Ltd. and account of Unitech Ltd. in the books of assessee. Ld. AR further referred to page 25 to 155 of the paper book showing loan agreement along with confirmation of account in respect of various parties from whom loans were availed by pledging the security in the form of specific number of equity shares to Unitech Ltd.

20. Ld. AR also submitted that all the transactions have been entered through D. Mat account and also appraised that one cannot enter in equity shares transaction other than by D.Mat account and all the movements of equity shares of Unitech Ltd. with regard to purchase, sale, share pledge against loan taken as well as pledged shares returned back during the year are properly accounted for in the books of account and the books tallied with the D.Mat statement. The only reason for disallowance was due to arithmetical mistake committed by Id. Assessing Officer while making reconciliation statement and the addition was made only with regard to the 18000 bonus shares held. Ld. Assessing Officer failed to understand that bonus shares are allotted to the existing share holder only and there is no value attached to it and therefore, cost of such bonus shares is taken at Rs.NIL.

21. We have heard the rival contentions and perused the record placed before us. Revenue is aggrieved with CIT(A)'s order deleting the addition of Rs.76,50,000/- made u/s 69 of the Act. We find that issue centres around the unexplained non-reconciliation of stock statement vis-à-vis D.Mat account relating to 18000 equity shares of Unitech Ltd which as per Assessing Officer was not appearing in the books and accordingly applying the rate of Rs.425/- per share as on 1.10.2007 impugned addition of Rs.76,50,000/- was made. We further observe that assessee has given all necessary details during the course of assessment proceedings to satisfy the Assessing Officer about the reconciliation of equity shares of Unitech Ltd. which

were having a regular flow in and out of the D.Mat account of assessee on account of purchase, sale, pledging of shares against loan taken and received back the pledged shares once loan is paid and also the accounting of bonus shares. We find that Id. CIT(A) has also appreciated the details given by assessee and has deleted the impugned addition by observing as follows :-

7.3 I have considered the submissions made by the A. R. of the appellant and the observations of the assessing officer in the assessment order. Vide para-9 of the assessment order, the AO observed that investment in 18000 Unitech shares as on 1-10-2007 remain unexplained; and taking Rs.425/- as the unit price, addition of Rs,76.5 lakhs was being made. During the course of appellate proceedings, it was contended that while carrying out the re-conciliation of shares (at page 10 of the assessment order) certain mistakes were made by the AO; if these mistakes are taken care of, there would be no negative figure and no scope for addition. All the transactions in shares were routed through the de-mat account. The bonus shares allotted on the pledged shares got reflected in the de-mat accounts of the persons (with whom the shares were pledged by the appellant), and some of those bonus shares got transferred back to the appellant on his discharging the liabilities; Thus there was no unexplained investment in shares. Remand report was called for on the issue. As seen therefrom, AO reproduced the observations made in the assessment order but failed to controvert the contentions of the appellant. The remand report is silent on the issue of bonus shares. Therefore, impugned addition is deleted. This ground of appeal is allowed.

22. From going through the above finding of Id. CIT(A) as well as details filed in the form of paper book from page 10 to 155, we find that assessee has been able to fully demonstrate the reconciliation of the equity shares of Unitech Ltd. in the books of account with the

holding Unitech shares in the D.Mat account. The only reason for the impugned addition relating to 18000 bonus shares received on the equity shares held by assessee of Unitech Ltd. We observe that bonus shares are allocated through a regulated system of the company and are being issued to the existing shareholders and one cannot make a change at his own behest as the system works in automatic mode and bonus shares once issued by the Company automatically falls in the concerned D.Mat account of the existing share holder. We are, therefore, of the view that no disallowance was called for at Rs.76,50,000/- u/s 69 of the Act and as such no interference is called in the order of Id. CIT(A). We uphold the same. This ground of Revenue is dismissed.

21. Other grounds are of general nature which need no adjudication.

22. In the result, assessee's appeal is partly allowed and Revenue's appeal is dismissed.

Order pronounced in the open Court on 11 th November, 2016

Sd/-
(Rajpal Yadav)
Judicial Member

sd/-
(Manish Borad)
Accountant Member

Dated 11/11/2016

Mahata/-

Copy of the order forwarded to:

1.	The Appellant
2.	The Respondent
3.	The CIT concerned
4.	The CIT(A) concerned
5.	The DR, ITAT, Ahmedabad
6.	Guard File

BY ORDER

Asst. Registrar, ITAT, Ahmedabad

1. Date of dictation: 9/11/2016
2. Date on which the typed draft is placed before the Dictating Member: 11/11/2016 other Member:
3. Date on which approved draft comes to the Sr. P. S./P.S.:
4. Date on which the fair order is placed before the Dictating Member for pronouncement: _____
5. Date on which the fair order comes back to the Sr. P.S./P.S.:
6. Date on which the file goes to the Bench Clerk: 15/11/16
7. Date on which the file goes to the Head Clerk:
8. The date on which the file goes to the Assistant Registrar for signature on the order:
9. Date of Despatch of the Order: