

आयकर अपीलीय अधीकरण, न्यायपीठ – “A” कोलकाता,  
**IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA**  
 (समक्ष) Before श्री ए. टी. वर्की, न्यायिक सदस्य एवं/and श्री एम .बालागणेश, लेखा सदस्य)  
 [Before Shri A. T. Varkey, JM & Shri M. Balaganesh, AM]

**I.T.A. No. 1933/Kol/2014**  
**Assessment Year: 2010-11**

Assistant Commissioner of Income-tax, Circle-34, Kolkata.	Vs.	Banwari Lall Passari (PAN: AACFB 7511 A)
Appellant		Respondent

&

**I.T.A. No. 1625/Kol/2014**  
**Assessment Year: 2010-11**

Banwari Lall Passari	Vs.	Assistant Commissioner of Income-tax, Circle-34, Kolkata.
Appellant		Respondent

Date of Hearing	14.06.2017
Date of Pronouncement	23.08.2017
For the Revenue	Shri R. S. Biswas, CIT, DR
For the Assessee	Shri S. Jhajharia, FCA

**ORDER**

**Per Shri A.T.Varkey, JM**

Both these cross appeals filed by the revenue and the assessee respectively are against the order of Ld. CIT(A)-XX, Kolkata dated 11.07.2014 for AY 2010-11.

2. First we will take up Revenue's appeal. Ground no. 1 of revenue's appeal which reads as under:

*“1. On the facts and circumstances of the case and in law, the CIT(A) erred in holding that provisions of Rule 8D2(iii) is not applicable in respect of shares held as stock in trade in view of the fact that recently ITAT, Mumbai Bench in the case of Damani Estates & Finance Pvt. Ltd. held that the words used in Rule 8D are value of investment and not held as investment.”*

3. Brief facts of the case are that the AO observed that the assessee has earned dividend income of Rs.51,84,650/- and long term capital gain of Rs.2,11,547/- which the assessee claimed as exempt u/s. 10(34) and 10(38) of the Income-tax Act, 1961 (hereinafter referred to as the "Act") respectively. So, he asked the assessee as to why disallowance of the expenses should not be made for the earning the exempt income. The AO observes that pursuant to the said notice, the assessee had filed certain computation before him which was not acceptable for the AO, so he proceeded to compute the expenses incurred for earning exempt income as per Rule 8D of the Income Tax Rules, 1962 (hereinafter referred to as the "Rules"). Thereafter, the assessee preferred an appeal before the Ld. CIT(A), who gave partial relief to the assessee by holding as under:

*"After going through the facts and circumstances of the case and submission of the appellant, I find merit in their argument that so far Rule 8D(2)(ii) is concerned, since, there was no borrowed fund utilized in acquiring shares, the said rule is not applicable. Further, in view of the judgment of ITAT, Kolkata Bench 'A' in the case of REI Agro Industries Ltd. Vs. DCIT (2013) reported in 144 ITD 141 in which it is held that "in respect of provisions of Rule 8D(2)(iii), which is the subject matter of the appeal in the assessee's hand, a perusal of the said provision shows that what is disallowable under rule 8D(2)(iii) is the amount equal to ½ percentage of the average value of investment the income from which does not or shall not form part of the total income ", the A.O. is directed to take Rs.5,91,13,039/- for the purpose of average of investment as against Rs.9,45,23,277/- for calculating disallowance under Rule 8D(2)(iii) of the I. T. Rule. Thereby, the appeal is partly allowed."*

Aggrieved by the aforesaid decision of the Ld. CIT(A), the revenue is in appeal before us.

4. We have heard rival submissions and have gone through the case records carefully. We note that the Ld. CIT(A) by following the order of this Tribunal has held that ½ percentage of the average value of investment prescribed under Rule 8D(2)(iii) of the Rules shall be computed on the dividend bearing scrips. The Hon'ble Calcutta High Court in GA No. 1150 of 2015, ITAT No. 52 of 2015, CIT Vs. M/s. G K K Capital Markets (P) Ltd. dated 10.02.2017 wherein their Lordships upheld the Tribunal decision that *once the assessee has kept the shares as stock in trade, the Rule 8D of the Rules will not apply*. Therefore, we reiterate the view taken by the coordinate bench in REI Agro Industries Ltd. Vs. DCIT 144 ITD 141 and so, we do not find any merit in the ground of appeal raised by the revenue and hence, it stands dismissed.

5. Ground no.2 of appeal of revenue and the sole ground of appeal of the assessee emanates from the action of the Ld. CIT(A) in reducing the amount of addition made by the AO u/s. 41(1) of the Act from Rs.4,15,00,000/- to Rs.33,98,930/-.

6. Brief facts of the case are that the AO while going through the Balance Sheet of the assessee found that an amount of Rs.15,22,03,728/- has been shown as unsecured loans for which the assessee was paying interest of Rs.1,34,60,414/-. The AO also noted that an amount of Rs.9,13,36,769/- was shown against M/s. Metals Centre Ltd. (M/s. MCL). However, no interest was being paid on this loan amount and the confirmation of the said loan amount did not bear the signature of the said party. Thereafter, the AO summoned the Director of M/s. MCL and his statement was recorded u/s. 131 on oath which has been reproduced by the AO from pages 4 and 5 of his order. Thereafter, the AO after taking the explanation from the assessee in respect to the said loan noticed that the lender though has stated that it will be pursuing to recover the principal amount has not given any evidence for doing so. Therefore, according to the AO, the principal amount and the interest on it (principal amount Rs.4,15,00,000/- and interest Rs.4,98,36,769/-) was added u/s. 28(iv) and 41(1) of the Act. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who gave partial relief to the assessee and restricted the addition to Rs.33,98,930/-. Aggrieved by the partial relief granted to the assessee, the revenue as well as the assessee is in appeal before us.

7. We have heard rival submissions and gone through the facts and circumstances of the case. We note that during the year ended 31.03.1998 the assessee had borrowed a sum of Rs.65,00,000/- through banking channel from M/s. India Foils Ltd. and the said principal amount of loan together with interest amounting to Rs.1,10,62,519/- as on 31.03.2002 which comprised of the principal amount of Rs.65,00,000/- and interest amount of Rs.45,62,519/-. During the year ended 31.03.1994, the assessee had borrowed a loan of Rs.3,50,00,000/- from M/s. Salasar Industrial Services Ltd. ( M/s. SISL) through banking channel from M/s. India Foils Ltd. and such principal amount of loan as on 31.03.2002 together with interest amounting to Rs.8,02,74,250/- which comprised of principal amount of loan of

Rs.3,50,00,000/- and interest amount of Rs.4,52,74,250/-. The aforesaid two loan creditor companies under an order of the Hon'ble Calcutta High Court got amalgamated with M/s. MCL and as per the amalgamation order all the aforesaid principal amount of loan and outstanding, amount of interest were transferred to the books of M/s. MCL w.e.f. 01.04.2002 which is evident from a perusal of pages 77 and 78 of the paper book from which we note that an amount of Rs.8,02,74,250/- got transferred and this is the account statement in name of M/s. SISL in the books of the assessee and from the perusal of page 79 which is the account statement in the name of M/s. India Foils Ltd. in the books of the assessee, the amount of Rs.1,10,62,519/- was transferred to M/s. MCL as per the merger order of the Hon'ble Calcutta High Court. Thus, the total amount transferred to M/s. MCL is **Rs.9,13,36,769/-**.

8. We note that since there were some disputes regarding the rate of interest with M/s. MCL, the assessee did not credit any interest to M/s. MCL from 01.04.2002 and, therefore, did not provide for any further interest as provided by the assessee in the books of account. So, this explains why no interest has been paid on the loan amount taken from M/s. SISL and India Foils Ltd., which got merged with M/s. MCL w.e.f. 01.04.2002. We also note from a perusal of the statement recorded u/s. 131 of the Act of the Director of M/s. MCL that they were hopeful for realizing the principal amount at least in part to question no. 12 of the AO. In respect to question no. 5, the Director has answered that he joined as Director only in the year 2003 and the same balance was lying with **no movement**. We note that the assessee in its Balance Sheet as on 31.03.2010 relevant to AY under consideration, the total principal amount of loan of Rs.4,15,00,000/- and outstanding interest amounting to Rs.4,98,36,769/- is shown in the liability side to the tune of **Rs.9,13,36,769/-** as against M/s. MCL and this amount had been carried forward in the books of the assessee. We note that the loan creditor has not waived either the principal amount or the outstanding interest amount or any such amount has been written back by the assessee in their books of account or such amount or any part of such amount has been credited in the P&L Account of the assessee. M/s. MCL vide letter dated 25.03.2013 has confirmed that principal amount of

Rs.4,15,00,000/- receivable from the assessee and the interest receivable has been shown as Rs.4,64,37,839/-.

9. We note that the Director of M/s. MCL in his statement before the AO has not stated that the amount in question is not recoverable whereas he has said that they are trying to realize the amount and they are hopeful for realizing at least a part of it. The Ld. CIT(A) has rightly observed that provision of the said sum in its books of account (M/s. MCL) is merely an accounting entry which neither absolve the right of the loan creditor to recover the debt nor the liability of the assessee to pay back such sum. We note that the Director's statement u/s. 131 of the Act has confirmed that they are hopeful of realizing the amount at least in part and that he has joined only in the year 2003 and the same balance was lying with **no movement** as we earlier noted from page 78 of the paper book, which is the account statement in the name of M/s. SISL in the books of M/s. Banwari Lall Passari (assessee). We note that Rs.8,02,74,250/- was transferred from 01.04.2002 to M/s. MCL and on perusal of page 79, which is account statement in the name of M/s. India Foils Ltd. in the books of M/s. Banwari Lall Passari (assessee) an amount of Rs.1,10,62,519/- was transferred from 01.04.2002 to M/s. MCL which comes to Rs.9,13,36,769/- transferred to M/s. MCL as on 01.04.2002 as per the merger ordered by Hon"ble Calcutta High Court. However, we note that the Director of M/s. MCL in his statement u/s. 131 of the Act has stated that he joined M/s. MCL only in the year 2003 and that the debt was lying with no movement. In such a scenario, we can safely infer that the amount of Rs.9,13,36,769/- was lying with M/s. MCL as on 01.04.2002. The Ld. CIT(A) has noted from the letter dated 25.03.2013, which was the confirmation from M/s. MCL to the AO that there is a difference of Rs.33,98,930/- which he confirmed and against which the assessee is before us. We note that *as per section 41(1) of the Act, the remission or cessation of liability has to take place during the year under consideration.* In the present case, there is nothing on record to suggest that there was remission or cessation of liability in the AY 2010-11. On the contrary, as per the statement of the Director of M/s. MCL recorded by AO on that u/s. 131 of the Act suggests that when he joined as a Director only in 2003 the same balance was lying with no movement which suggests that the remission of Rs.33,98,930/- has taken

place between 01.04.2002 and 31.03.2003 and not in this assessment year. In such a scenario, section 41(1) of the Act has no application in this assessment year and, therefore, we direct deletion of Rs.33,98,930/- and allow assessee's appeal and confirm the partial relief granted by the Ld. CIT(A) and dismiss the revenue's ground of appeal.

10. In the result, appeal of revenue is dismissed and that of the assessee is allowed.

Order is pronounced in the open court on 23rd August, 2017

Sd/-  
(M. Balaganesh)  
Accountant Member

Sd/-  
(Aby. T. Varkey)  
Judicial Member

Dated :23rd August, 2017

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – ACIT, Circle-34, Kolkata.
2. Respondent –Banwari Lall Passari, 16, India Exchange Place, Kolkata-700001.
3. The CIT(A), Kolkata
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy,

By order,

Sr. Pvt. Secretary