

आयकर अपीलीय अधीकरण, न्यायपीठ – “A” कोलकाता,  
*IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA BENCH “A” KOLKATA*

Before **Shri Aby.T Varkey, Judicial Member** and  
**Shri Waseem Ahmed, Accountant Member**

**ITA No.600/Kol/2015**  
Assessment Year :2010-11

M/s Srikirti Stock Brokers Pvt. Ltd. ( <b>presently Tasha Investment Advisors Pvt.Ltd</b> ), 4, Ho-Chi-Min Sarani, Kolkata-700 071 <b>[Pan No. AACCT 2296 C]</b>	<b>V/s.</b>	DCIT, Kolkata-3 Aayakar Bhawan, 5 <sup>th</sup> Floor, P-7, Chowringhee Square, Kolkata-69
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri V.N. Purohit, FCA
प्रत्यर्थी की ओर से/By Respondent	Md.Usman, CIT-DR
सुनवाई की तारीख/Date of Hearing	05-07-2017
घोषणा की तारीख/Date of Pronouncement	01-09-2017

**आदेश /O R D E R**

**PER Waseem Ahmed, Accountant Member:-**

This appeal by the assessee is directed against the order of Commissioner of Income Tax-3, Kolkata passed u/s 263 of the Income Tax Act, 1961 (hereinafter referred to as ‘the Act’) vide his order dated 26.03.2015 pertains to assessment year 2010-11.

Shri V.N. Purohit, Ld. Authorized Representative appeared on behalf of assessee and Md. Usman, Ld. Departmental Representative represented on behalf of Revenue.

2. Both grounds are inter-related and therefore being taken up together for the sake of convenience. The issue raised by assessee is that Ld. CIT erred in holding the order of Assessing Officer as erroneous in so far as prejudicial to the interest of revenue.

3. Briefly stated facts are that assessee is a private limited company and has filed its return of income declaring total income of ₹15,37,529/- dated 15.09.2010. Subsequently the case was selected under scrutiny under CASS module. Accordingly, statutory notice u/s. 143(2) and subsequently notice u/s 142(1) were duly served upon the assessee. The assessment was framed u/s 143(3) of the Act after making certain additions / disallowances to the total income of the assessee at ₹14,33,110/- under the normal provision of the Act. However, the income under the provision of Minimum Alternate Tax (MAT) was determined at ₹68,31,595/- only as tax liability was higher under the provision of MAT and therefore the assessee was liable to pay tax under MAT.

4. Subsequently, the Ld. CIT u/s 263 of the Act observing certain defects in the assessment order on account of following reasons:-

- i) The expenditure of ₹4,05,922/- in relation to capital gain income and ₹ 578/- on account of commission of insurance was disallowed by the assessee in the order but the AO omitted to add back the aforesaid expenditures disallowed while computing the taxable income under the normal provision of the Act.
- ii) Similarly, an amount of ₹28,20,067/- was disallowed u/s. 14 of the Act but the same was not added back while determining the book profit u/s. 115JB of the Act.

In view of the above, Ld. CIT observed that the order of AO is erroneous in so far as prejudicial to the interest of revenue and accordingly called upon the assessee for the explanation by issuing a notice u/s 263 of the Act.

4.1 The assessee before Ld. CIT submitted that no expense of ₹4,05,922/- was claimed by it so there is no question of any disallowance of the said expense. According, there was no under assessment of income.

Similarly the borrowed fund was utilized in the securities which have resulted short term capital gain income and therefore, it was taxable at the concessional rate of tax u/s. 111A of the Act. Besides the above assessee also submitted that there was no other expense was incurred by assessee

engaged in the business of investment in shares and securities in relation to exempted income. The assessee also submitted that the provision of Section 14A r.w.s. 8D of the Income Tax Rule, 1962 are not applicable to the computation of book profit. Therefore, no disallowance was made by the AO.

4.2 However, Ld. CIT in his impugned order u/s 263 of the Act disregarded the contention of assessee and held that the order of AO is erroneous in so far as prejudicial to the interest of revenue by observing as under:-

*"3. It is observed that AO after detailed discussion has disallowed expenses on investment for earning exempt income, u/s 14A of the IT Act to the tune of Rs. 28,20,067/-. As the expenditure disallowed u/s 14A refers to the expenditure pertaining to exempt income (which falls under Section 10 of the Act); hence the book profit should have been increased by the amount disallowed u/s 14A of the Act. However, the AO for the purpose of calculation of tax as per the provisions of MAT failed to take into account the same. In this regard, point no. (f) of the explanation (1) to the section 115JB of the Income Tax Act, holds that the 1 Book profit shall be increased by the amount or amounts of expenditure relatable to any income to which section 10 (other than the provisions contained in clause (38)) is applicable. Therefore, the AO has failed to apply his mind and apply the relevant law to the facts of the case and therefore the order of the AO is erroneous thereby prejudicial to the interest of revenue.*

*4. The assessee during the course of assessment proceedings has not provided details regarding the bifurcation of interest expenditure claimed against exempt income and taxable income. Hence, the interest expenditure cannot be wholly attributable to earning taxable income. There are various case laws of Hon'ble Courts which have decided that in the case of mixed funds, interest paid on borrowed funds is also relatable to interest on investment made in tax-free funds. When borrowed funds, being in the nature of mixed funds, are utilised by the assessee; the interest paid on borrowed funds is also relatable to interest on investment made in tax free funds.*

*5. The assessee has stated that it had not claimed the amount of Rs.4,05,922/- on account of expenditure related to capital gains and Rs.5,768/- on account of Commission on insurance, under any head of income. And that under assessment of income under normal computation of income does not arise. Thus, the assessee has accepted the error. The Assessing Officer in the 'Order u/s.143(3) dated 11.09.2012 had deducted total expenditure, as per the P&L account of the assessee, amounting to Rs.29,50,413/- from the business income of the assessee. However, AO had failed to add back the amount of RS.28,20,067/- for the purposes of calculation of book profit u/s 115 JB of the I. T. Act*

*6. It is well settled that incorrect assumption of facts or application of law satisfies the requirement of the law i.e. **"order being erroneous and prejudicial to the interest of revenue."** The order passed by the AO without*

*application of mind or orders showing apparent error of reasoning or the orders where the A.O. simply accepts what the assessee has stated in his return of income and fails to make the enquiries which are called for in the facts and circumstances of the case, will also call for intervention u/s.263 by the CIT. It is also a trite law that the disclosure of facts by the assessee in the return of income or/and in the course of assessment proceedings cannot give immunity from revisional jurisdiction of the CIT u/s.263. The above position of the law has been reiterated by the Hon'ble Supreme Court in various decisions including that of Rampyari Devi Saraogi Vs. CIT [67 ITR 84 (SC) ] ; Tara Devi Agarwal Vs. CIT [88 ITR 323 (SC)] ; Malabar Industries Co. Ltd. Vs. CIT [198 ITR 611 (Ker) ].*

*7. I have considered the matter, the facts of the case and the submissions of the assessee, and I am of the opinion that the AO has failed to apply his mind to the law applicable to the facts, while completing the assessment u/s. 143(3) and thereby the assessment is erroneous and prejudicial to the interest of revenue. I am of the opinion that the case has to go back to the A.O. for completing fresh assessment."*

Being aggrieved by this order of Ld. CIT assessee came in appeal before us.

5. Before us Ld. AR submitted that the AO in giving effect order has not made the disallowance of the expense for ₹4,05,922/- and ₹5,768/- and therefore the impugned order passed by Ld. CIT u/s 263 of the Act on this issue become infructuous.

As far as disallowance directed by Ld. CIT u/s 115JB of the Act it was submitted by Ld. AR that the provision of Section 14A r.w.s 8D of the Rule, cannot be imported under the MAT provision. Ld. AR in this connection, relied on the order of Special Bench of ITAT Delhi Bench in the case of *ACIT Circle 17(1) vs. Vireet Investment Pvt. Ltd.* in ITA No. 502/Del/2012 vide order dated 16.06.2017, wherein it was held as under:-

*"6.22. In view of above discussion, we answer the question referred to us in favour of assessee by holding that the computation under clause (f) of Explanation I to section 115JB(2), is to be made without resorting to the computation as contemplated u/s. 14A read with Rule 8D of the Income tax Rules, 1962."*

He fairly requested the Bench to confirm the order of AO.

On the other hand, Ld. DR vehemently relied on the order of Ld. CIT.

6. We have heard rival contentions of both the parties and perused the material available on record. At the outset, we find that impugned order passed by Ld. CIT(A) u/s. 263 held the order of AO as erroneous in so far as prejudicial to the interest of revenue on account of two reasons:-

- i) Expense was disallowed by the AO in the order for ₹4,05,922/- and ₹ 5,768/- respectively but the same was not added in the computation of income;
- ii) The amount of ids u/s. 14A of the Act was not added to the book profit computed u/s. 115JB of the Act.

In connection with the first disallowance we find that no addition was made by the AO in giving effect order of Ld. CIT direction. Therefore, on this count, the impugned order Ld. CIT cannot be held as erroneous in so far prejudicial to the interest of Revenue.

6.1 Now, coming to the other point wherein Ld. CIT held the order of AO as erroneous in so far as prejudicial to the interest of revenue for the reasons that the AO omitted to add the disallowance of the expenses in relation exempted income u/s 115JB of the Act. In this regard, the argument placed by Ld AR is that provision of Section 14A of the Act cannot be imported to the provision of Section 115JB of the Act. It is because the provision of Section 115JB of the Act starts with the non obstante clause, therefore the provisions of section 14A of the Act are not applicable to the MAT provisions. Ld. AR in this connection has also relied on the order of Special Bench ITAT Delhi in the case of *Vireet Investment Pvt. Ltd.* (supra). However, we find that the Hon'ble Jurisdictional High Court in the case of *CIT vs. Jayshree Tea and Industries Ltd.* in **GA No.1501/2014** ITA No.47/2014 dated 19.11.2014 has held as under:-

*“we find computation of the amount of expenditure relatable to exempted income of the assessee must be made since the assessee has not claimed such expenditure to be Nil. Such computation must be made by applying clause (f) of Explanation 1 under section 115JB of the Act. We remand the matter for such computation to be made by the learned Tribunal.*

*We accept the submission of Mr. Khaitan, learned Senior Advocate that the provision of section 115JB in the matter of computation is a complete code in itself and resort need not and cannot be made to section 14A of the Act.”*

From the above, it is clear that the disallowance made under the provisions of section 14A of the Act cannot be imported while disallowing the expenses in relation to exempted income under the provisions of MAT. But the disallowance under clause (f) to explanation 1 of section 115JB of the Act needs to be made independently after referring the expenses debited in the profit & loss account. We also find that the case law cited by the Ld. AR is not relevant as that there was no reference to the judgment of the Hon'ble jurisdictional High Court as discussed above. Thus, we are of the view those case laws are irrelevant as the instant issue is squarely covered in favour of Revenue and against the assessee in terms of clause(f) of Explanation-1 to Section 115JB of the Act. As the AO in the instant case has not made any disallowance under the computation MAT, therefore the order of the AO is erroneous in so far prejudicial to the interest of Revenue. Thus the ground of appeal of Assessee is partly allowed.

**7. In the result, assessee's appeal is partly allowed.**

Order pronounced in the open court 01/09/2017

Sd/-  
(Aby. T. Varkey)  
(Judicial Member)  
Kolkata,  
\*Dkp

Sd/-  
(Waseem Ahmed)  
(Accountant Member)

दिनांक:- 01/09/2017 कोलकाता ।

**आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-**

1. अपीलार्थी/Appellant-M/s Srikirti Stock Brokers Pvt. Ltd. (presently Tasha Investment Advisors Pvt. Ltd.)4, Ho Chi Min Sarani, Kolkata-71
2. प्रत्यर्थी/Respondent-DCIT, Kolkata-3,Aayakar Bhawan, 5<sup>th</sup> Fl, P-7 Chowringhee Sq. Kol-69
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

Sr. Private Secretary, Head of Office/DDO  
आयकर अपीलीय अधिकरण,  
कोलकाता ।