

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

I.T.A. No. 818 /Kol/2015
Assessment Year: 2008-09

Deputy Commissioner of Income-tax, Circle-10(1), Kolkata.	Vs.	M/s. BNK Capital Markets Ltd. (PAN: AABCB4140N)
Appellant		Respondent

Date of Hearing	06.07.2017
Date of Pronouncement	13.09.2017
For the Appellant	Shri Saurabh Kumar, Addl. CIT(DR)
For the Respondent	Shri S. K. Tulsian, Advocate

ORDER

Per Shri A.T.Varkey, JM

This is an appeal preferred by the revenue against the order of Ld. CIT(A)-4, Kolkata dated 10.04.2015 for AY 2008-09.

2. The main grievance of the revenue is against the action of the Ld. CIT(A) in quashing the reassessment made u/s. 147/143(3) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”)

3. Brief facts of the case are that the assessee is an NBFC company and registered under the Reserve Bank of India Act, 1934. In the relevant assessment year, the assessee has earned total dividend income of Rs.1,47,37,000/-. The assessee had also earned short term capital gains of Rs.1,68,39,000/- and also claimed loss under the head “Long Term Capital Gains” to the tune of Rs.3,34,000/-. The assessee filed return of income declaring a total income of Rs.84,16,518/- comprising of interest income, capital gains, dividend etc. The AO completed the assessment of income for the assessee u/s. 143(3) of the Act at a total income of Rs.1,31,85,570/- whereby taking the income of Rs.1,68,39,000/- arising out of sale of shares as its business income instead of the assessee’s claim of treating the same

under the head capital gains. The AO also disallowed Rs.50,67,847/- u/s. 14A of the Act read with Rule 8D of the Income-tax Rules, 1962 (hereinafter referred to as the "Rules") and accordingly, an addition of Rs.47,69,055/- in excess of assessee's suo motu disallowance of Rs.2,98,894/- was made to the total income of the assessee company. Aggrieved by the aforesaid decision of the AO, the assessee preferred an appeal before the Ld. CIT(A), who vide his appellate order dated 18.11.2011 passed u/s. 250 of the Act directed the following instructions to the AO.

*"1) To assess the income of Rs.1,68,39,000/- considering it as 'short term capital gain' as declared by the assessee company and not income from business.
ii) To fix the disallowance u/s. 14A r/w rule 8D at Rs.50,67,849/- and not Rs.45,45,023/- as claimed by the assessee, vide the revised computation submitted by it."*

Aggrieved by the aforesaid order of the Ld. CIT(A), the revenue filed an appeal before the Tribunal against the order of the Ld. CIT(A). The assessee also filed a cross objection before the Tribunal against the order of the Ld. CIT(A) against disallowance u/s. 14A of the Act read with Rule 8D of the Rules at Rs.50,67,849/-.

4. While the aforesaid appeal of the Revenue and the cross objection of the assessee were preferred in the Tribunal, on 28.03.2013, the AO sought to reopen the assessment for the relevant assessment year and served notice u/s. 148 of the Act. The assessee sought the reasons for reopening vide letter dated 02.10.2013 and the AO gave the reasons recorded on 10.02.2014 from which it transpired that the reason for reopening was "*alleged non-disclosure of true and full income in respect of calculation of disallowance u/s. 14A.*" After learning about the reasons for reopening, the assessee brought to the notice of the AO vide letter dated 05.03.2014 that the subject matter of reopening i.e. the issue of disallowance u/s. 14A of the Act was the subject matter of appeal before the Ld. CIT(A) and now before the Tribunal and hence, it cannot be an item for reopening as per proviso (3) to section 147 of the Act. However, the AO ignored the objections of the assessee and passed the reassessment on 06.03.2014 computing disallowance u/s. 14A of the Act read with Rule 8D of the Rules at Rs.85,76,982/- thus making an addition to the tune of Rs.35,09,133/- to the earlier disallowance of Rs.50,67,849/-. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A), who was pleased to quash the reopening and consequent reassessment made by the AO. Aggrieved by the aforesaid decision of the Ld. CIT(A), the revenue is before us.

5. We have heard rival submissions and gone through facts and circumstances of the case. We note that the main grievance of the department is that the reopening was made much before the date of the order of the Tribunal in assessee's case regarding the issue of disallowance under section 14A of the Act read with Rule 8D of the Rules. We note that the third proviso to section 147 of the Act reads as under:

“Provided also that the AO may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment”.

The proviso categorically takes out the AO's jurisdiction to reopen and reassess issues which are subject matters of any appeal or revision in the relevant assessment year. So, therefore, when admittedly on 18.11.2011, the Ld. CIT(A) has passed the appellate order u/s. 250 of the Act which involved issue of disallowance u/s. 14A of the Act, which was later on challenged by the assessee before the Tribunal by an appeal, the reopening was not permissible. In such a scenario, initiation of reopening proceedings on the very same issue which has already been appealed against by the assessee before the Ld. CIT(A) and thereafter, before the Tribunal, bars the AO to initiate reopening proceeding on the subject matter which was appealed against by the assessee before the Ld. CIT(A) and on which decision was rendered on 18.11.2011 by the Ld. CIT(A) and the Ld. CIT(A) has already adjudicated the issue of 14A disallowance which was further appealed by the assessee before the Tribunal. Therefore, the 3rd proviso to sec. 147 of the Act clearly bars the AO from reopening the subject matter which was subjected to appeal by the assessee before the Ld. CIT(A)/Tribunal. In the aforesaid facts and circumstances, we do not find any infirmity in the order passed by the Ld. CIT(A) and, therefore, we are inclined to uphold the impugned order of Ld. CIT(A) and dismiss the appeal of the revenue.

6. In the result, the appeal of revenue is dismissed.

Order is pronounced in the open court on 13.09.2017

Sd/-
(Waseem Ahmed)
Accountant Member

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

Dated : 13th September, 2017

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – DCIT, Circle-10(1), Kolkata
2. Respondent – M/s. B N K Capital Markets Ltd., 2, Palm Avenue, Mayfair Towers, Kolkata-19.
3. The CIT(A), Kolkata
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy,

By order,

Sr. Pvt. Secretary