

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G': NEW DELHI BEFORE, AND**

**SHRI M. BALAGANESH, ACCOUNTANT MEMBER
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER**

**ITA No.3307/Del/2019
(ASSESSMENT YEAR 2014-15)**

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| M/s Sara International Private Limited 102, Krishna Apra Business Square Netaji Subhash Place New Delhi-110 034 PAN-AAACS 1878B | Vs. | Addl.CIT Range-22 New Delhi |
| (Appellant) | | (Respondent) |

**ITA No.1974/Del/2019
(ASSESSMENT YEAR 2014-15)**

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| Jt.CIT Circle-22(1) New Delhi | Vs. | M/s Sara International Private Limited 102, Krishna Apra Business Square Netaji Subhash Place New Delhi-110 034 PAN-AAACS 1878B |
| (Appellant) | | (Respondent) |

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| Assessee by | Sh. Salil Kapoor, Adv. Sh. Utkarsh Gupta, Adv. and Sh. Tarun Chanana, Adv. |
| Department by | Sh. Anuj Garg, Sr. DR |

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| Date of Hearing | 10/10/2023 |
| Date of Pronouncement | 13/10/2023 |

ORDER

PER M. BALAGANESH AM:

These cross appeals of the Assessee as well as Revenue arises out of the common order of the Learned Commissioner of Income Tax (Appeals)-28, New Delhi, [hereinafter referred to as 'Ld. CIT(A)'] in Appeal No.82/17-18 dated 21/12/2018 against the order passed by Additional Commissioner of Income Tax, Range22, New Delhi, (hereinafter referred to as the 'Ld. AO') u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') on 28/12/2016 for Assessment Year 2014-15.

2. The following grounds raised by assessee as well as Revenue in the cross appeals:

ITA No.3307/Del/2019 by assessee.

- “1. That the Learned Commissioner of Income Tax (Appeals) has erred in confirming disallowance of Rs. 5698750/- u/s 14A of the Act, which was inadvertently voluntarily added by the assessee in the computation of income for the year.
2. That the Learned Commissioner of Income Tax (Appeals) failed to restrict the disallowance u/s 14A to the extent of dividend income of Rs. 556500/- and did not appreciate that the department cannot take the benefit of a mistake committed by the assessee.
3. That the Learned Commissioner of Income Tax (Appeals) erred in confirming disallowance of Rs. 1164626/- on account of Commission and brokerage, with total disregard to the facts and circumstances of the case.
4. The assessee reserves his right to add, amend, alter or delete any ground of appeal at the time of hearing.”

ITA No.1974/Del/2019 by Revenue.

- “1. Whether on the facts and circumstances of the case, the Ld. CIT(A) was justified in deleting the disallowance of Rs.1,69,15,250/- made u/s 14A of the IT Act, 1961.
 2. Whether on the facts and circumstances of the case, the Ld. CIT(A) was justified in ignoring the fact that the assessee company has invested its borrowed money for such investment of shares, stocks and mutual funds and other investments, as is evident from increasing expenses under the head ‘interest’ which are capable of generating income which does not or shall not form part of total income of the assessee.
 3. Whether on the facts and circumstances of the case, the Ld. CIT(A) was justified in deleting the disallowance of Rs.8,11,917/- made on account of Wharfage Charges expenses.”
3. At the outset, we find that there is a delay in filing of appeal by the assessee before us by 56 days. The affidavit and delay condonation petition has been duly furnished by the assessee and on

perusal of the same, we hold that the assessee was prevented from the sufficient cause in not filing the appeal in time before us. Accordingly, the delay is hereby condoned and appeal of the assessee is hereby admitted for adjudication.

4. As identical issues are involved in both the appeals they are taken up together and disposed of by this common order for the sake of convenience.

5. **Issue No.1- Disallowance u/s 14A of the Act.**

Ground No.1 & 2 of assessee's appeal and Ground Nos.1 & 2 of Revenue appeal.

We have heard the rival submissions and perused the material available on record. The assessee company is engaged in the trading of iron ore fines, cement, coal, readymade garment, etc. The AO observed that the assessee had made huge investments in various quoted and unquoted shares and also paid huge interest on its borrowings. The Ld. AO concluded that assessee had earned three types of exempt income as under:

(i) Dividend claimed as exempt- Rs.5,56,500/-

(ii) Long Term Capital gain on sale of shares- Rs.1,31,42,773/- (iii)

Long term capital gain on conversion of capital asset on which tax has been paid during the year as per the computation of income- Rs.20,56,02,471/-.

5.1. In the aforesaid exempt income, the Ld. AO proceeded to apply the computation mechanism provided in Rule 8D (2)(ii) of the Income Tax Rules for making disallowance u/s 14A of the Act. The

assessee had made *suo moto* disallowance of expenses of Rs.56,98,750/- in the return of income u/s 14A of the Act r.w.Rule

8D of the Rules as under:-

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| Under rule 8D (2)(ii) | - | 2,01,40,000/- |
| 8D(2)(iii) | - | 24,74,000/- |
| | | 2,26,14,000/- Less: |
| Disallowance made by the assessee | 56,98,750/- | |
| Total disallowance made u/s 14A | | 1,69,15,250/- |

6. The assessee specified before the Ld. CIT(A) that the Ld. AO erred in considering the correct exempt income per se. It was specifically

pointed out that the figure of Rs.1,31,42,773/- which was

considered as long term capital gain on sale of shares by the Ld. AO was actually long term capital loss. This fact was duly clarified by the assessee before the Ld. CIT(A). It was accordingly pleaded that the actual exempt income is only Rs.5,56,500/- representing dividend income. The Ld. CIT(A) having appreciated the contentions of the assessee proceeded to confirm the disallowance of expenses u/s 14A of the Act to the extent of *suo moto* disallowance made by the assessee in the sum of Rs.56,98,750/-, on the ground that the same had been offered voluntarily by the assessee in the return of income.

7. Aggrieved by the order, both assessee as well as Revenue are in appeals before us. We find that the law is very well settled that the disallowance u/s 14A of the Act cannot exceed the exempt income. We find that the instant case, the exempt income is only Rs.5,56,500/-. Hence, the disallowance u/s 14A of the Act cannot exceed Rs.5,56,500/-. Reliance in this regard is placed on the decision of Hon'ble Jurisdictional High Court in the case of *Joint Investments (P) Ltd. vs. CIT [2015] reported in 372 ITR 694 (Delhi)*. We are conscious of the fact that by this process, the assessed income might go below the returned income as

assessee would be entitled for additional relief of Rs.51,42,250/- (R.56,98,750 – Rs.5,56,500) u/s 14A of the Act. It is trite law that there is no estoppel against the statute.

8. The Ld. DR before us vehemently relied upon the decision of Hon'ble Supreme Court in the case of *CIT vs. Shelly Products, reported in [2003] 261 ITR 367 (SC)* and pleaded that this Tribunal would not be justified in granting excess relief to the assessee.
9. We have gone through the decision of the Hon'ble Supreme Court. In that case, the assessee had offered certain income and paid advance tax and TDS in the return of income. The assessment was framed by the Assessing Officer. Subsequently, that assessment was declared as void *ab initio*. Thereafter, the assessee sought refund of the advance tax and TDS paid by him along with return of income. The Hon'ble Supreme Court interfered and said that when an assessment made by the Assessing Officer is nullified and if the Assessing Officer cannot make a fresh assessment for the very same assessment year in accordance with law under the provisions of the Act, it only amounts to deemed acceptance of the return of income

furnished by the assessee. In these facts and circumstances, it was held by the Hon'ble Supreme Court that the advance tax and TDS paid by the assessee cannot be refunded to the assessee. In our considered opinion, the said decision is factually distinguishable with the assessee in as much as in the instant case, the assessment framed by the Ld. AO is alive and had not been declared as *void abinitio*. Now pursuant to this Tribunal order, the assessee is getting a relief of Rs.51,42,250/- u/s 14A which might result in assessed income going below the returned income. In these circumstances, the assessee would be rightly entitled for seeking refund of taxes paid by him in the return of income. We find the Hon'ble Jurisdictional High Court in the case of *CIT vs. Sam Global Securities Ltd. reported in 360 ITR 682 (Delhi)* had considered the similar issue and had applied all the decisions

and given a comprehensive judgment as under:

"5. The tribunal has reversed the said findings after referring to the factual matrix. Reference was made to the decision of the Supreme Court in CIT Vs. Mr. P. Firm, (1965) 56 ITR 67 (SC) and Circular No. 114 XL-35 of 1955 issued by the Central Board of Direct Taxes on 11th April, 1955, that an officer must not take advantage of ignorance of the assessee as to his rights. Judgment of the Supreme Court in Goetze India Ltd. (supra) was distinguished on the ground that the said case was limited to the power of the assessing authority and did not impinge upon the power of the tribunal. The matter was remanded to the Assessing Officer to consider the case on merits and decide accordingly.

6. In *Commissioner of Income Tax Vs. Jai Parabolic Springs Ltd.*, [2008] 306 ITR 42 (Delhi), a Division Bench of this Court made reference to the following passage from *National Thermal Power Co. Ltd. Vs. CIT*, [1998] 229 ITR 383(SC):-

"The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. We do not see any reason to restrict the power of the Tribunal under Section 254 only to decide the grounds which arise from the order of the Commissioner of Income Tax (Appeals). Both the assesses as well as the Department have a right to file an appeal/cross-objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier."

7. Reference was also made to an earlier decision of the Supreme Court in *Jute Corporation of India Ltd. Vs. CIT*, [1991] 187 ITR 688 (SC), wherein it has been held as under:-

"An appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the absence of any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. There is no good reason to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessed in seeking modification of the order of assessment passed by the Income Tax Officer. This Court further observed that there may be several factors justifying the raising of a new plea in an appeal and each case has to be considered on its own facts. The Appellate Assistant Commissioner must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The Appellate Assistant Commissioner should exercise his discretion in permitting or not permitting the assessed to raise an additional ground in accordance with law and reason. The same observations would apply to appeals before the Tribunal also."

8. Decision in the case of *Goetze (India) Ltd.* (supra) was distinguished in *Jai Parabolic Springs Ltd.* (supra) in the following words:-

"In Goetze (India) Ltd. Vs. CIT [2006] 284 ITR 323 (SC) wherein deduction claimed by way of a letter before the Assessing Officer, was disallowed on the ground that there was no provision under the Act to make amendment in the return without filing a revised return. Appeal to the Supreme Court, as the decision was upheld by the Tribunal and the High Court, was dismissed making clear that the decision was limited to the power of the assessing authority to entertain claim for deduction otherwise than by a revised return, and did not impinge on the power of the Tribunal."

9. In *CIT Vs. Natraj Stationery Products (P) Ltd.*, (2009) 312 ITR 222 reliance placed on *Goetze (India) Ltd.* (supra) by the Revenue was rejected, as the assessee had not made any „new claim“ but had asked for re-computation of deduction under *Section 80-IB*. The said decision may not be squarely applicable but the Courts have taken a pragmatic view and not the technical view as what is required to be determined is the taxable income of the assessee in accordance with the law. In this sense, assessment proceedings are not adversarial in nature.

10. *In Commissioner of Income Tax Vs. Rose Services Apartment India P. Ltd., [2010] 326 ITR 100 (Delhi) relying upon the decision of the Supreme Court in National Thermal Power Co. Ltd.(supra), a Division Bench of this Court rejected the plea of the Revenue that the tribunal could not have entertained the plea, holding that the tribunal was empowered to deal with the issue and was entitled to determine the claim of loss, if at all, under one section/provision or the other.*
11. *Decision in Goetze (India) Ltd. (supra) was again relied upon by the Revenue in CIT Vs. Jindal Saw Pipes Ltd., [2010] 328 ITR 338 (Delhi) but the contention was not accepted, observing that the tribunal"s jurisdiction is comprehensive and assimilates issues in the appeal from the order of the CIT (Appeals) and the tribunal has the discretion to allow a new ground to be raised.*
12. *In view of the aforesaid discussion, we are not inclined to interfere with order passed by the tribunal. The appeal is dismissed."*

10. It is also to pertinent to note that the said decision of the Hon'ble Delhi High Court was challenged by the Revenue by way of Special Leave Petition (SLP) before the Hon'ble Supreme Court and the same was dismissed by Hon'ble Supreme Court vide order dated 04/04/2014. Further, we also find that the Hon'ble Gujarat High

Court in the case of *CIT vs. Milton Laminates Ltd. reported in 37*

taxmann.com 249 (Guj.) had also held that after considering the decision of Hon'ble Supreme Court in the case of *CIT vs. Shelly Products refer (supra)* had held that the Assessing Officer is entitled to compute income lower than the return of income.

11. In view of the aforesaid observations and respectfully following the judicial precedents relied upon herein above, we hold that the
the
disallowance u/s 14A of the Act should be restricted to
Rs.5,56,500/- only. Accordingly, the ground Nos.1 & 2 raised by the assessee are partly allowed and Grounds No.1 & 2 raised by the Revenue are partly allowed.

12. **Issue No.2 - Disallowance of Wharfage Charges-**

Rs.8,11,917

Ground No.3 of Revenue's appeal.

We have head the rival submissions and perused the materials available on record. The assessee company claimed total expenses of Rs.62,44,530/- under the head Wharfage charges. The assessee

furnished the details of the same before the Ld. AO. The Ld. AO on perusal of the said details observed that Wharfage charges incurred by the assessee on three dates were in violation of provisions of Railways Act, 1989 and which constitute an offence under any other law for the time being in force. Accordingly, a sum of Rs.8,11,917 was sought to be disallowed by the AO by applying the provisions of Explanation-1 to Section 37(1) of the Act. The Ld. AO also relied upon the decision of the Hon'ble Rajasthan High Court in the case of TISCO Ltd. vs. Union of India and Anors., dated 28/01/2014 in SB Civil Misc. Appeal No.65/1997. The assessee submitted before the Ld. CIT(A) that charges paid by the assessee is only demurrage charges to the shipping agents and port authorities pursuant to the contractual obligation. It was submitted that Wharfage charges are charges assessed by a shipping terminal or port when goods are moved through the locations. Wharfage is one the costs of transport goods within the distribution system used by a business to bring its goods to market. These charges are payable to Port Authorities by the importer directly or through its agent by the import of consignment in regard to unloading of cargo from ship and to further transport to the warehouse of importer. It was submitted

that the same is part of the contractual obligation and hence cannot be construed as penal in nature. The assessee placed reliance on the decision of Hon'ble Jurisdictional High Court in the case of *PCIT vs. National Fertilizer Ltd. in ITA No.782/2016* dated 24/04/2017 wherein the Hon'ble Jurisdictional High Court after considering the decision of Delhi High Court in the case of *Mahalakshmi Sugar Mills Co. Ltd. v. CIT reported in 157 ITR 683 (Delhi)*, decision of Allahabad High Court in the case of *Nanhoomaljiyoti Prasad Vs. CIT 123 ITR 269 (Allahabad)* and after distinguishing the decision of Hon'ble Rajasthan High Court relied upon by the Ld. AO in the case of *TISCO vs. Union of India dated 28/01/2014* had categorically held that the payment of Wharfage Charges is not penal in nature and would be allowable as deduction u/s 37 of the Act. The Ld. CIT(A) appreciated the contentions of the assessee and deleted the disallowance. We find that the Ld. CIT(A) had granted relief to the assessee by following the decision of the Hon'ble Jurisdictional High Court and hence, we do not find any infirmity in the order passed by the Ld. CIT(A) thereon. No other contrary was placed on record before us except the decision of Hon'ble Rajasthan High Court which was already preferred (supra) and already distinguished by Hon'ble Jurisdictional High Court as

stated (supra). Accordingly, ground No.3 raised by the Revenue is dismissed.

13. Issue No.3 - Disallowance of commission expenses-

Rs.11,64,626/-

Ground No.3 of assessee appeal.

We have heard the rival submissions and perused the materials available on record. The assessee has claimed expenses Rs.1,84,07,654/- for the year under consideration under the head Commission and brokerage. The details of the same were duly furnished by supporting evidences by the assessee before the Ld. AO. The Ld. AO on perusal of the same observed that the commission payments made to following two parties were not supported by bills and hence, the same is to be disallowed u/s 37 of the Act as not related to the business:

| | |
|-------|--|
| | “1. Hemara Global Advisors LLC- Rs.10,58,357/- |
| | 2. Radovan Damjanovic - Rs.1,06,268/- |
| Total | <u>Rs.11,64,626/-</u> |

14. The assessee produced the bills and vouchers for the payment of the aforesaid commission before the Ld. CIT(A). The Ld. CIT(A),

however, observed that though bills were submitted by the assessee, there was no formal written agreement between the assessee and the aforesaid two commission agents and accordingly, assessee had also failed to prove the actual rendition of services by aforesaid two parties. With these observations, the Ld. CIT(A) upheld the disallowance.

15. The Ld. AR before us stated that the payments were made by account payee cheque to the aforesaid two parties after due deduction of tax at source and pleaded for allowability of the said expenditure as incurred for the purpose of business. In our considered opinion, it is fact on record that whether these payees had indeed actually rendered any services to the assessee to enable them to get payment of commission from the assessee is a fact to be examined by the Ld. AO. Once, it is proved that these two payees had indeed rendered services to the assessee, then the commission expenditure become allowable expenditure. With these directions, we deem it fit to appropriate to restore this issue to the file of the Ld. AO to decide the same in view of the above mentioned

directions. The assessee is also at liberty to furnish fresh evidences, if any, in support of its contentions. Accordingly, the ground No.3 raised by the assessee is allowed for statistical purposes.

16. The ground No.4 raised by the assessee is general in nature and does not require any specific adjudication.

17. In the result, the appeal of the assessee is partly allowed for statistical purposes and appeal of the Revenue is partly allowed.

Order pronounced in the open court on 13th October, 2023.

Sd/-

(ANUBHAV SHARMA)
JUDICIAL MEMBER

Dated: 13/10/2023 Pk/sps

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(M. BALAGANESH)
ACCOUNTANT MEMBER

ASSISTANT REGISTRAR
ITAT NEW DELHI

