IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA No.212 of 2017 (O&M)
Assessment Year : 2006-07
Decided on : 29.10.2018

Pr. Commissioner of Income Tax (Central), Gurgaon

.... Appellant

Versus

M/s Ind Swift Limited

...... Respondent

2. ITA No.205 of 2017 (O&M)
Assessment Year : 2007-08

Pr. Commissioner of Income Tax (Central), Gurgaon

.... Appellant

Versus

M/s Ind Swift Limited

...... Respondent

CORAM : HON'BLE MR. JUSTICE AJAY KUMAR MITTAL, JUDGE
HON'BLE MR. JUSTICE AVNEESH JHINGAN, JUDGE

Present : Mr. Rajesh Sethi, Senior Standing Counsel with
Mr. Arun Biriwal, Advocate
for the appellant.

Mr. Surjit Bhadu, Advocate
for the respondent.

* * *

AVNEESH JHINGAN, J.

This order shall dispose of two appeals bearing ITA Nos.212 and 205 of 2017. Since the facts and the issues involved in both the appeals are identical, hence, these are being disposed of by a common order.

2. For sake of convenience, the facts are being extracted from ITA No. 212 of 2017.

3. The revenue has filed the present appeal under Section 260A of Income Tax Act, 1961 (for brevity, 'the Act') against the order of Income Tax Appellate Tribunal, Chandigarh (hereinafter referred to as 'Tribunal') passed in ITA No.511/Chd/2011 dated 28.08.2014 for the assessment year 2006-07.

4. Appellant-revenue has claimed following substantial questions of law :-

i) Whether on the facts and circumstances of the case, the Hon'ble ITAT was justified in restricting the disallowance made u/s 14A from ₹1,09,32,198/- to ₹5 lakhs without any sound and valid reason?

ii) Whether on the facts and circumstances of the case, the Hon'ble ITAT was justified in rejecting the method for calculation of disallowance u/s 14A provided in Rule 8D just because the said Rule was inserted from 23.04.2008 even if it was a logical method?

iii) Whether on the facts and circumstances of the case, the Hon'ble ITAT was justified in rejecting the method for calculation of disallowance u/s 14A provided in Rule 8D just because the said Rule was inserted from 23.04.2008, when this was the prescribed method available in the statute when the disallowance was made?

5. The facts emanating from the paper-book are that for assessment

year 2006-07, the assessee-company filed a return declaring the income of ₹4,88,99,380/-. Subsequently, a return was filed on 06.06.2007 declaring the total income of ₹5,05,07,437/-. The case was selected for scrutiny. Notice under Section 143(2) of the Act was issued on 22.09.2007. The assessment under Section 143(3) of the Act was finalised vide order dated 30.12.2008. Apart from other issues, the Assessing Officer noticed that the assessee had invested a sum of ₹15,38,82,785/- in share of other companies. The Assessing Officer (AO) invoked the provisions of Section 14A of the Act read with Rule 8D of Income Tax Rules, 1962 (for brevity, 'Rules). The AO by applying Rule 8D of the Rules worked out the disallowance of expenses at ₹1,09,32,198/-.

6. Against the said order, the assessee-company filed an appeal before the Commissioner of Income Tax (Appeals), Chandigarh (for brevity, '(CIT(A)'). The First Appellate Authority vide order dated 30.04.2009 sustained the additions made by disallowing expenses under Section 14A of the Act. The assessee preferred a further appeal before the Tribunal. The appeal of the assessee was partly allowed vide order dated 28.08.2014. The Tribunal followed the decision of the Bombay High Court in case of ***Godrej and Boyce Mfg. Co. Ltd. vs. Dy. CIT, 2010 (328) ITR 81 (Bom)*** and held that Rule 8D of Rules was not applicable during the relevant assessment year. The Tribunal, however, held that only a reasonable disallowance can be made and after considering the facts sustained disallowance of ₹5 lakhs under Section 14A of the Act. Hence the present appeal.

7. Heard learned counsel for the parties.

8. Learned counsel for the appellant contended that though Rule 8D of Rules was inserted w.e.f. 24.03.2008, however, the Rule provided

only a guideline for calculation of disallowance of expenditure attributable to exempted income to be made under Section 14A of the Act and hence the disallowance of ₹5,00,000/- only sustained by the Tribunal is unjustified.

9. Learned counsel for the assessee-company relied upon the decision of the Supreme Court in the case of ***Commissioner of Income Tax vs. ESSAR Teleholding Ltd., (2018) 401 ITR 445 (SC)*** and argued that the decision of the Bombay High Court has been affirmed and it has been held that Rule 8D of the Rules is prospective in operation.

10. The pin-pointed issue involved in the present appeal is whether for assessment year 2006-07 the assessing Officer could rely upon Rule 8D of the Rules for working out the disallowance of expenses under Section 14A of the Act?

11. The matter is no longer res-integra. The Supreme Court in the case of ***ESSAR Teleholding Ltd.'s case (supra)*** held as follows:-

> "45. As noted above, that Rule 8D has again been amended by Income Tax (Fourteenth Amendment) Rules, 2016 w.e.f. 02.06.2016, by which Rule 8D subrule (2) has been substituted by a new provision which is to the following effect:
>
> *(2) The expenditure in relation to income which does not form part of the total income shall be the aggregate of following amounts, namely:*
>
> *(i) the amount of expenditure directly relating to income which does not form part of total income; and*
>
> *(ii) an amount equal to one per cent of the annual average of the monthly averages of the opening and closing balances of the value of investment, income from which does not or shall not form part of total income:*

Provided *that the amount referred to in clause (i) and clause (ii) shall not exceed the total expenditure claimed by the assessee."*

46. The method for determining the amount of expenditure brought in force w.e.f. 24.03.2008 has been given a go bye and a new method has been brought into force w.e.f. 02.06.2016, by interpreting the Rule 8D retrospective, there will be a conflict in applicability of 5th & 14th Amendment Rules which clearly indicates that the Rule has a prospective operation, which has been prospectively changed by adopting another methodology.

47. One of the submissions raised by the learned counsel for the assessee also needs to be noticed. Learned counsel for the assessee submits that it is well settled that subordinate legislation ordinarily is not retrospective unless there are clear indication to the same. Reliance has been placed on judgment of this Court in ***State of Jharkhand & Ors. Vs. Shiv Karampal Sahu, (2009) 11 SCC 453***. In para 17 following has been stated:

> *"17. Ordinarily, a subordinate legislation should not be construed to be retrospective in operation. The Circular Letter dated 752003 was given a prospective effect. The father of the respondent died on 1952000. There is nothing to show that even Circular dated 982000 had been given retrospective effect. In any view of the matter, as the State of Jharkhand in the Circular Letter dated 75/2003 adopted the earlier circular letters*

> *issued by the State of Bihar only in respect of cases where death had occurred after 15.10.2000 i.e. the date from which the State of Jharkhand came into being, the High Court, in our opinion, committed a serious error in giving retrospective effect thereto indirectly which it could not do directly. Reasons assigned by the High Court, for the reasons aforementioned, are unacceptable.*"

There is no indication in Rule 8D to the effect that Rule 8D intended to apply retrospectively.

48. Applying the principles of statutory interpretation for *interpreting retrospectivity of a fiscal statute and looking into the nature and purpose of subsection (2) and sub section (3) of Section 14A as well as purpose and intent of Rule 8D coupled with the explanatory notes in the Finance Bill, 2006 and the departmental understanding as reflected by Circular dated 28.12.2006, we are of the considered opinion that Rule 8D was intended to operate prospectively.*

49. It is relevant to note that impugned judgment in this appeal relies on earlier judgment of Bombay High Court in ***Godrej and Boyce Mfg. Co. Ltd. vs. Dy. CIT, (supra)*** *where the Division Bench of the Bombay High court after elaborately considering the principles to determine the prospectivity or retrospectivity of the amendment has concluded that Rule 8D is prospective in nature. Against the aforesaid judgment of the Bombay High court dated 12.08.2010 an appeal* *was filed in this court which has been decided by vide its judgment reported in **Godrej and Boyce Mfg. Co. Ltd. vs. Dy. CIT, (2017) 295 CTR (SC) 121 : (2017) 151 DTR (SC) 89 : (2017) 7 SCC 421.** This Court, while deciding the above appeal repelled the challenge raised by the assessee regarding vires of Section 14A. In para 36 of the judgment, this Court noticed that with regard to retrospectivity of provisions Revenue had filed appeal, hence the said question was not gone into the aforesaid appeal. In the above case, this Court specifically left the question of retrospectivity to be decided in other appeals filed by the Revenue. We thus have proceeded to decide the question of retrospectivity of Rule 8D in these appeals.*

50. In view of our opinion as expressed above, dismissal of the appeal by the Bombay High Court is fully sustainable. As held above, the Rule 8D is prospective in operation and could not have been applied to any assessment year prior to Assessment Year 2008-09."

12. The opinion expressed by the Bombay High Court was upheld laying down that Rule 8D of the Rules is prospective in operation and could not have been applied to any assessment prior to assessment year 2008-09. Hence, the issue is decided against the revenue.

13. As per question No.1 claimed by the appellant whether the Tribunal was justified in restricting the disallowance made under Section 14A of the Act to ₹5 lakhs without any sound and valid reason, the same need not be gone into as the assessee-company has not challenged the order. Moreover, it would be pertinent to mention here that the AO in the

assessment order recorded that there is no prescribed method for working of disallowance and thereafter only relied upon Rule 8D of the Rules.

14. No interference is called for in the order passed by the Tribunal. No substantial question of law arises.

15. Consequently, the appeals are dismissed.

(AJAY KUMAR MITTAL)
JUDGE

(AVNEESH JHINGAN)
JUDGE

October 29, 2018
anju

Whether speaking/reasoned: Yes

Whether reportable : Yes