IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "A", MUMBAI

BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND
SHRI SANJAY GARG, JUDICIAL MEMBER

ITA Nos.5329 & 6293/M/2012
Assessment Years: 2008-09 & 2009-10

Dr. Ashwin Balchand Mehta, 2nd Floor, Mani Mahal, 11/21 Mathew Road, Opera House, Mumbai - 400004 **PAN: AACPM 8363J**	Vs.	Joint Commissioner of Income Tax, Range – 11(2), Aayakar Bhavan, M.K. Marg, Mumbai - 400020
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Nitesh Joshi, A.R.
Revenue by : Shri Rakesh Ranjan, D.R.

Date of Hearing : 22.07.2015
Date of Pronouncement : 06.11.2015

O R D E R

Per Sanjay Garg, Judicial Member:

The above titled appeals have been preferred by the assessee against two different orders dated 10.07.2012 & 23.08.2012 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment years 2008-09 and 2009-10 respectively. Since common issues are involved in both the appeals, hence, they are taken together and are being disposed of with this common order. For the sake of convenience, the facts have been taken from ITA No.5329/M/2012 for A.Y. 2008-09.

ITA No.5329/M/2012 for A.Y. 2008-09

2. The assessee has taken the following grounds of appeal:

"1. The Learned Commissioner of Income tax [CIT(A)] has erred in

confirming the action of the Assessing Officer in not allowing any deduction u/s 54(1) of the Act. On the facts and in the circumstances of the case Learned CIT(A) ought to have accepted the appellant's claim of deduction u/s.54(1) at Rs.25,46,760/-.

2. Learned CIT(A) has erred in not entertaining claim of the Appellant that deduction u/s *54(1)* ought to be allowed at Rs. 25,46,760 as against Rs.16,81,790/- claimed in the Return of Income on the ground that any claim which is not made in the return of income cannot be substituted without filing of revised return of income. On facts and circumstances of the case and in law, the appellant's claim of deduction u/s.54(1) of Rs.25,46,760/-, being the amount utilised by the appellant for acquiring the residential property on or before the due date of filing the return of income, ought to be allowed.

3. Learned CIT(A) has erred in confirming the disallowance u/s.14A of Rs.7,69,490/under section 14A of the Act read with rule 8D of the Income Tax Rules, 1962. On the facts and in circumstances of the case, disallowance made ought to be deleted or in the alternative substantially reduced.

4. While confirming the disallowance of Rs. 7,69,490 U/S 14A, learned CIT(A) has erred in holding that the appellant cannot take up the issue in appeal on the ground that AO has observed in the assessment order that "the appellant has no objection to the disallowance u/s 14A". The Appellant having objected to the above observation of the AO in ground of appeal raised before the CIT(A) and appellant not having made any such statement before AO , the said disallowance ought to be deleted.

5. The appellant craves leave to add, alter, amend and/or rescind any grounds of appeal during the course of the hearing."

Ground No.1 & 2

3. Ground No.1 & 2 relates to deduction under section 54(1) of the Act. The brief facts of the case are that the assessee had sold one flat on 17.12.07 for a sale consideration of Rs.1.65 crores on which the capital gains had been computed at Rs.61,38,810/-. The assessee claimed deduction of Rs.16,81,790/- under section 54(1) and deduction of Rs.35 lakhs under section 54E of the Act. As regards the deduction under section 54(1), the assessee submitted before the Assessing Officer (hereinafter referred to as the AO) that the assessee had entered into an agreement with M/s. Ideal Hights Pvt. Ltd. for purchase of a

flat at Kolakata. The assessee also furnished a copy of allotment letter dated 20.03.07. It was contended that an amount of Rs.16,81,790/- was paid as an advance for the purchase of the said flat and the total amount of sale consideration was settled at Rs.43,35,850/-. The AO noticed that the assessee had neither executed any agreement of purchase of the flat nor had furnished any certification of completion or occupation of the said flat. The assessee had not taken possession of the flat till December 2010. Considering the above facts, he rejected the claim of deduction under section 54(1) of the Act.

4. In appeal before the Ld. CIT(A), the assessee submitted that although, in the return of income the assessee had claimed deduction of Rs.16,81,790/- only. However, the assessee had made investment of Rs.25,46,760/- till the due date of filing of return of income for the year under consideration. The assessee claimed that what was required to claim deduction under section 54(1), was to make investment in residential house for purchase of house within a period of one year before or two years after the date of transfer of original asset or for construction of residential house within a period of three years from the date of transfer of original asset. The assessee claimed that the assessee had invested an amount of Rs.25,46,760/- till the due date of filing of return of income. The assessee also furnished a chart giving details of payment beginning from the date of 22.03.07 and ending on 15.03.12 and submitted that the purchase deed had been completed on 16.03.12.

5. The Ld. CIT(A), after considering the submissions of the assessee, held that the assessee had not made the claim in the return of income of Rs.25,46,760/-under section 54(1), rather the claim of deduction of Rs.16,81,790/- only was made. He held that the assessee, since, had not revised the claim by way of filing a revised return of income, hence the claim

of the assessee could not be considered in this respect. He, further, observed that the house in question was not transferred in the name of the assessee within three years from the date of sale of the house by the assessee. He held that the assessee had not acquired interest in the house which was allegedly purchased on a subsequent date. Hence, the AO rightly disallowed the claim of the deduction under section 54(1) of the Act. Being aggrieved by the order of the Ld. CIT(A), the assessee has come in appeal before us.

6. We have considered the rival contentions. We find that in a very recent decision, the Hon'ble Karnataka High Court in the case of "CIT vs. B.S. Shantakumari" in ITA No.165 of 2014 vide order dated 13.07.2015 has held that section 54F of the Act is a beneficial provision which permits for construction of residential house. Such provision has to be construed liberally for achieving the purpose for which it is incorporated in the statute. The intention of the legislature, as could be discerned from the reading of the provision, would clearly indicate that it was to encourage investments in the acquisition of a residential plot and completion of construction of a residential house in the plot so acquired. A bare perusal of said provision does not even remotely suggest that it intends to convey that such construction should be completed in all respects in three years and/or make it habitable. The essence of said provision is to ensure that assessee who received capital gains would invest same by constructing a residential house and once it is established that consideration so received on transfer of his Long Term capital asset has invested in constructing a residential house, it would satisfy the ingredients of Section 54F. If the assessee is able to establish that he had invested the entire net consideration within the stipulated period, it would meet the requirement of Section 54F and as such, assessee would be entitled to get the benefit of Section 54F of the Act. Though such construction of building may not be

complete in all respect that by itself would not disentitle the assessee to the benefit flowing from Section, 54F.

7. In view of the above decision of the Hon'ble Karnataka High Court (supra), we examine the facts of the present case and find that the assessee had booked the flat with the builder and an allotment letter was given to the assessee. The house was under construction. Under such circumstances it can be safely presumed that the assessee had invested the money for construction of the house through the builder. So the money invested by the assessee within three years from the date of transfer is allowable as deduction under section 54 of the Act. The assessee has claimed that up to the due date of filing of the return for the year under consideration, he had invested an amount of Rs.25,46,760/-. Therefore, the assessee is entitled to claim the said sum as deduction under section 54(1)/54F for the year under consideration.

8. So far as the contention that the assessee in the return of income had not claimed the amount of Rs.25,46,760/- but of Rs.16,81,790/- is concerned, we find that the powers and jurisdiction of the Ld. CIT(A) are coterminous with that of AO. The Hon'ble Bombay High Court, in the case of "CIT vs. Pruthvi Brokers and Shareholders Pvt. Ltd." (2012) 349 ITR 336 (Bom.) while relying upon the various decisions of the Hon'ble Supreme Court and other Hon'ble High Courts, has held that even if a claim is not made before the AO, it can be made before the appellate authorities. The jurisdiction of the appellate authorities to entertain such a claim is not barred. The Hon'ble Bombay High Court while relying upon the decision of the Hon'ble Supreme Court in the case of 'Jute Corporation of India Limited vs. CIT' 1991 Supp (2) SCC 744 = (1991) 187 ITR 688 has further observed that the power of the Appellate Commissioner is coterminous with that of the Income Tax Officer and an

appellate authority while hearing appeal against the order of the subordinate authority, has all the powers which the original authority may have in deciding the questions before it, subject to the restrictions or limitations, if any, prescribed by 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. An assessee is entitled to raise not merely additional legal submissions before the appellate authorities but is also entitled to raise additional claims before them. The appellate authorities have the discretion whether or not to permit such additional claims to be raised. It cannot, however, be said that they have no jurisdiction to consider the same. The appellate authorities have jurisdiction to deal not merely with additional grounds which become available on account of change of circumstances or law, but with additional grounds which were available when the return was filed but could not have been raised at that stage. The words 'could not have been' raised must be construed liberally and not strictly. It is open to the assessee to claim a deduction before the appellate authority which could not have been claimed before the AO. The Hon'ble Bombay High Court has further observed that the decision of Hon'ble Supreme Court in the case of 'Goetze (India) Limited v. CIT' (2006) 157 Taxman 1, regarding the restriction of making the claim through a revised return was limited to the powers of the Assessing Authority and the said judgment does not impinge on the power or negate the powers of the appellate authorities to entertain such claim by way of additional ground.

9. In view of the above, we direct the AO to allow the claim of the assessee under the provisions of section 54(1)/54F of the Act in respect of the amount which was invested for the purchase/allotment of the new house up to the due date of filing of return of the income for the year under consideration.

Ground No.3 & 4

10. Vide ground No.3 & 4, the assessee has raised the issue of disallowance of expenditure under section 14A of the Income Tax Act read with rule 8D of the Income Tax Rules. During the appellate proceedings, the AO noted that the assessee had made investments for earning of tax exempt income. He accordingly computed the disallowance as per the provisions of rule 8D of the Income Tax Rules.

11. In appeal before the Ld. CIT(A), the assessee contended that the assessee is a doctor by profession and has earned exempt income of Rs.81,21,676/-. The assessee had incurred Demat expenditure of Rs.19,381/-, advisory services charges of Rs.3,28,731/- and securities transactions tax and other charges of Rs.1,92,076/- aggregatingRs.5,40,188/- which amount was suo-moto disallowed by the assessee. However, the AO without considering the computation/working provided by the assessee straightway applied rule 8D and computed the disallowance accordingly.

The assessee further submitted that during the earlier assessment year 2007-08, the disallowance under section 14A was restricted to bank charges and accounting charges by the Ld. CIT(A). The Ld. A.R. has further submitted that except the expenses suo-moto disallowed by the assessee, no other expenditure was incurred for earning of exempt income. The Ld. CIT(A), however, did not agree with the contentions raised by the assessee. He observed that the assessee had debited bank charges of Rs.5,426/-, miscellaneous expenses of Rs.1,53,706/- which included accounting expenses of Rs.71,500/-, printing and stationary expenses of Rs.71,931/-, insurance and office expenses etc. in the P&L account. He, therefore, relying upon the decision of the Hon'ble Bombay High Court in the case of "Godrej & Boyce Manufacturing Co. Ltd. Vs. DCIT [(2010) 328 ITR 81 (Bom)]" held that rule

8D was applicable for the year under consideration and accordingly upheld the disallowance made by the AO as per the provisions of rule 8D of the I.T. Rules. Being aggrieved, the assessee has come in appeal before us.

12. We have considered the rival submissions of the Ld. representatives of the parties. It may be observed that in the case of 'Godrej & Boyce Manufacturing Co. Ltd.' (supra), the Hon'ble Bombay High Court has held that Rule 8D r.w.s. 14A(2) is not arbitrary or unreasonable and also not retrospective and applies from A.Y. 2008-09. It has been further held that under section 14A of the Income Tax Act, resort can be made to Rule 8D of the Income Tax Rules for determining the amount of expenditure in relation to exempt income, if, the AO is not satisfied with the correctness of the claim made by the assessee in respect of such expenditure. The satisfaction of the Assessing Officer has to be arrived at, having regard to the accounts of the assessee. Sub section (2) does not ipso facto enable the Assessing Officer to apply the method prescribed by the rules straightaway without considering whether the claim made by the assessee in respect such expenditure is correct. The satisfaction of the Assessing Officer must be arrived at on an objective basis. In a situation where the accounts of the assessee furnish an objective basis for the Assessing Officer to arrive at a satisfaction in regard to the correctness of the claim of the assessee, there would be no warrant for taking recourse to the method prescribed by the rules. An objective satisfaction contemplates a notice to the assessee, an opportunity to the assessee to place on record all the relevant facts including his accounts and recording of reasons by the Assessing Officer in the event that he comes to the conclusion that he is not satisfied with the claim of the assessee.

13. However, a perusal of the assessment order reveals that the AO has not followed the guidelines of objective satisfaction as laid down by the hon'ble Bombay high Court in the case of Godrej & Boyce (supra) while making the disallowance . He without recording any reasoning for his dissatisfaction with regard to the working/claim of the assessee, straightway applied Rule 8D against the mandate of the provisions of section 14A of the Income Tax Act. The ld. CIT(A) also ignored the mandate of the provisions of section 14 A, while confirming the disallowance.

14. Coming to the facts of the case in hand, we find that in this case the assessee suo-moto has disallowed expenditure of Rs.5,40,188/- which he has claimed to have incurred on Demat charges, advisory services and security transactions tax. The Ld. A.R. of the assessee has submitted that no expenditure was incurred in relation to exempt income for the year under consideration. The investments were made in the past and no investment was made during the year, hence no disallowance should be made under section 14A read with rule 8D.

On the other hand, the Ld. D.R. has submitted that the assessee had debited certain expenses like bank charges, accounting charges etc. which were related to the investment activity of the assessee.

15. As noted above, in the earlier Assessment Year 2007-08, the Ld. CIT(A) had restricted the disallowance to the extent of bank charges and accounting charges. Considering the overall facts and circumstances of the case, we find that apart from the suo-moto disallowance of Rs.5,40,188/-, the further disallowance which can be added is in relation to bank charges of Rs.5,426/- and accounting expenses of Rs.71,500/-. So considering the overall facts and circumstances of the case, the disallowance under section 14A is restricted to the suo-moto disallowance made by the assessee of Rs.5,40,188/- + Rs.5,426/-

towards bank charges + Rs.71,500/- incurred towards accounting expenses. This ground is accordingly partly allowed.

Now coming to the appeal of the assessee for A.Y. 2009-10.

ITA No.6293/M/2012 for A.Y. 2009-10

Ground No.1

16. Ground No.1 is relating to the disallowance of Rs.5,81,245/- under section 14A read with rule 8D of the I.T. Rules. During the year under consideration, the assessee had earned dividend/tax free interest income aggregating Rs.56,54,905/-. The assessee suo-moto allowed an amount of Rs.1,32,619/- incurred towards Demat expenditure, advisory services and security transaction tax. The assessee in the P&L Account has debited bank charges of Rs.1,680/- and accounting expenses.

17. In view of our observations made above while deciding the appeal of the assessee for A.Y. 2008-09, we restrict the disallowance under section 14A to the extent of suo-moto disallowance made by the assessee + bank charges + accounting charges debited in the P&L Account. This issue is decided accordingly.

Ground No.2

18. Ground No.2 is relating to the disallowance of Rs.31,685/- being 10% of the telephone expenses debited by the assessee in the P&L Account. The AO disallowed 20% of the said expenses holding that the personal use of the telephone cannot be ruled out.

19. In appeal, the Ld. CIT(A) has restricted the disallowance of 10% of the telephone expense.

20. We find that the nature of the telephone expenses is that some element of personal use cannot be ruled out. The Ld. CIT(A) has very fairly restricted the disallowance of the telephone expense to 10%. We do not find any infirmity in the order of the Ld. CIT(A) in this respect. This issue is accordingly decided against the assessee.

Ground No.3

21. Ground No.3 is in relation to the confirmation of disallowance of 1/6 of interest on motor car loan and motor car insurance. The AO noted that the assessee has disallowed 1/6 of the car expenses and depreciation but no disallowance was offered on interest on car loan and insurance on car of Rs.1,98,491/- and Rs.83,023/- respectively. He accordingly disallowed the 1/6 of the above expenses. The Ld. CIT(A), after considering the facts and circumstances of the case, has observed that the assessee himself has disallowed 1/6 car expenses but left out to disallow the expenses related to interest on car loan and insurance on car which are very much part of the car expenses. We do not find any infirmity in the order of the lower authorities in making the above disallowance. Ground No.3 is therefore dismissed.

22. In view of our above observations, the appeals of the assessee are partly allowed.

Order was pronounced in the open court on 06.11.2015.

Sd/-	**Sd/-**
(G.S. Pannu)	**(Sanjay Garg)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated: 06.11.2015.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.