IN THE INCOME TAX APPELLATE TRIBUNAL, "C" BENCH, KOLKATA

Before : Shri Mahavir Singh,Judicial Member, and
Shri M. Balaganesh, Accountant Member

I.T.A Nos. 2137/Kol/2010 & 612/Kol/2011
A.Ys. 2005-06 & 2007-08

ACIT, Cir-54, Kolkata	Vs.	Sri Pawan Kumar Jhunjhunwala PAN: ACPPJ2615K
(Appellant/Department)		(Respondent/Assessee)

I.T.A Nos. 2000& 2001/K/2010, 758 &536/Kol/2011
A.Ys. 2005-06, '06-07, '07-08

Sri Pawan Kumar Jhunjhunwala	Vs.	ACIT, Cir-54, Kolkata
(Appellant)		(Respondent)

For the Appellant/department: Shri Sanjay Mukherjee, JCIT, ld.DR
For the Respondent/assessee : Shri R.N Bajoria, Advoate ld.AR

Date of Hearing: 05-10-2015
Date of Pronouncement: 06-11-2015

ORDER

SHRI M.BALAGANESH, AM

The aforesaid appeals of the assessee and the revenue arise out of the following appellate orders for the Asst Years 2005-06 ; 2006-07 & 2007-08 and order of the Administrative Commissioner of Income Tax u/s 263 for the Asst Year 2006-07 against the orders of assessment framed u/s 143(3) of the Income Tax Act 1961 (hereinafter referred to as the 'Act').

2. All these appeals are taken up together for the sake of convenience as the issues involved in all the years are identical in nature. The various issues raised in several

grounds of appeal both by the assessee and by the revenue are adjudicated independently issue wise herein below.

ISSUE I – Taxability of advance received from clients in the year of receipt even though the assignments were completed in the subsequent year

3. The brief facts of this issue is that the assessee is an individual and engaged in the legal profession under the name and style of 'Jhunjhunwala & Co' following regularly cash system of accounting. The total income comprises mainly of professional income, short term capital loss, long term capital gain and interest income from other sources. The entire books of accounts viz cash book, ledger, bills / vouchers, etc were produced by the assessee before the Learned AO and the same were examined on test check basis by the Learned AO. These facts on record are undisputed and indisputable.

3.1. During the course of assessment proceedings, the Learned AO found that the assessee had shown certain sums as 'Advance from Clients' in the liability side of the balance sheet. The assessee was confronted by the Learned AO as to why the same should not be taxed as income in the year of receipt in line with the cash system of accounting regularly followed by the assessee. The assessee replied that the advance payments are received from clients on account of court fees, counsel fees , stamp duty, registration charges, typing charges, photocopying charges, travelling expenses etc. Advance payments received are adjusted against the bill amount and the bills are generally raised after conclusion of the matters. The Learned AO not being satisfied with this reply sought to bring to tax the advance received from clients as income in the hands of the assessee in the year of receipt in line with cash system of accounting followed by the assessee. On first appeal, the assessee reiterated the submissions stated before the Learned AO and the Learned AO having stated that the advances received from clients cannot take the character of a trading receipt unless the services

are rendered and bills are raised by the assessee, sought to restrict the disallowance to 10% of advances as income in view of the fact that the assessee could not furnish the complete details substantiating that no income actually arising in the previous year was postponed to the next year. Aggrieved by this decision, both the assessee as well as the revenue are in appeals before us for various asst years by raising various grounds.

3.2. The assessee has been consistently following cash system of accounting and treating the advance received from clients as a liability in the balance sheet and the same are taken to income as and when the relevant matters are concluded. This practice has been followed by the assessee right from Asst Year 1985-86 onwards. During the course of scrutiny assessment proceedings for the Asst Years 2003-04 & 2004-05, this stand of the assessee has been accepted by the revenue and no addition towards advance received from clients was made for those two asst years. However, a paradigm shift was made by the revenue for Asst Years 2005-06 & 2007-08 by bringing the same to tax. In response to this, the Learned DR vehemently supported the orders of the Learned AO.

3.3. We have heard the rival submissions and perused the materials available on record. We find that the assessee being an individual engaged in the legal profession had to receive certain advances from clients for taking care of certain expenses to be incurred for and on behalf of the client and the same is reflected in the balance sheet as a liability. The said liability takes the character of income on completion of the matters / assignment taken up by the assessee. We hold that the solicitor is the agent of the client. The client makes over the money to the solicitor for some work being done by the solicitor as his agent. The money must be employed to that purpose and must not be treated as money received for any other purpose. This position is not altered by the fact that the solicitor retains a lien upon the balance of the money for his costs. The result of solicitor having a lien on the balance of the money is no more

than a person having a charge on somebody else's money. When a solicitor receives money from his client, he does not do so as a trading receipt but he receives the money of the principal in his capacity as an agent and that also in a fiduciary capacity. The solicitor remains liable to account by this money to his client and hence it does not become the income of the assessee.

3.4. We find that the assessee has been consistently following this accounting practice for over two decades and no addition has been made by the Learned AO in the immediately preceding assessment years i.e Asst Years 2003-04 & 2004-05 on this issue. Though principle of res judicata do not apply to income tax proceedings and each assessment year is separate, the principle of consistency cannot be given a go by if there is no change in the facts and circumstances of the case . Reliance in this regard is also placed on the decision of the Hon'ble Apex Court in the case of *Radha Soami Satsang Vs. CIT reported in 193 ITR 321 (SC)*

3.5. Now coming to the reliance placed on the decision placed by the Learned AO on the co-ordinate bench decision of *Chennai Tribunal in the case of Sterling Holiday Resorts (I) Ltd vs ACIT reported in (2008) 111 ITD 116 (Chennai).* In that case, the assessee offered time share units to the customers for providing usership rights along with other facilities and amenities for the period of 99 years. The assessee company had 100% of the consideration on account of time share agreements from its customers. It, however, treated only 45% of the receipts so received as assessable in the relevant year and sought to defer the balance 55% of such receipts. The 55% receipts was sought to be spread over the duration of the said time share agreements on the ground that with reference to the said income, the assessee had obligations to discharge in future and to incur expenditure therefor. Accordingly, it has shown 55% of such receipts as its liability. Before the tribunal, the assessee could not give any particulars or details of the expenditure which it was obliged to incur for any obligation for which the said sum could be set apart. The Tribunal further found that

the said amount did not have the character of deposit for any expenses to be incurred in future. It found that the assessee had merely adopted a subterfuge to avoid payment of tax on 55% of the receipts. The basis facts in the said case were that the assessee never disputed the income character of the entire receipt. What it sought was that 55% of such income should be excluded from tax on the ground that it had to incur expenditure in several future years for obligations arising therefrom. It was claiming a set off of an estimated future expenditure for which it had incurred liability for earning 55% of such income. Since the assessee was not able to show any obligation for any expenditure to be incurred, the Tribunal rejected its claim for such estimated expenditure and held that it could not defer the income which it had admittedly received to suit its convenience. The Tribunal on examination of the facts found that the balance amount of 55% was not an advance and also not refundable. Thus, there was absolutely no rationale for excluding 55% from the income. It held that it was only a device to sweep the revenue.

3.5.1 But in the instant case, the assessee received certain amounts as advances from time to time to meet the expenses on behalf of their clients and the amount already spent is debited in their accounts and balance amounts have been carried forward to the next year and this accounting practice is a continuous process over the years. For the time being, the assessee was a custodian of that amount. Hence we hold that the decision of the Chennai Tribunal relied upon by the Learned AO is squarely distinguishable and cannot be applied to the facts of the instant case.

3.6. We find that the impugned issue is squarely covered by the decision of the *Hon'ble Jurisdictional High Court in the case of CIT vs Ratan Lal Gagar in ITAT NO. 80 of 2014 G.A.No. 1933 of 2014 vide order dated 12.9.2014* which dealt with the very same issue, wherein the questions raised before the court and the decision rendered thereon are as under:-

Questions :

i) Whether on the facts and in the circumstances of the case, the learned Tribunal has erred in law in deleting the addition of entire amount of Rs.1,25,62,006/- received by the assessee from his clients and following cash system of accounting ?

ii) Whether on the facts and in the circumstances of the case, the learned Tribunal has erred in deleting the addition of entire amount of Rs.1,25,62,006/- received by the assessee from his clients, by disregarding that the law firms following cash system putting aside all the advances in balance sheet, thereby they are deferring the tax liabilities and enjoying the said advances without paying tax?"

Page 2 & 3 of the order: -

"It is submitted by Mr. J.P Khaitan that the issue involved is covered by the judgment in CIT, West Bengal-I –vs. Sandersons & Morgans: 75 ITR 433 (Cal). In support of his submission, he has referred to a paragraph of the said judgment, which specifically deals with issue in the following manner:

"On the other hand, he submitted, when money was made over to the solicitor, in the instant case, the solicitor received the money as trading receipt. That character he submitted, was impressed upon the money throughout and the balance of that money, even though refundable to the client, when transferred to the profit and loss account would be profit out of trading receipt and consequently assessable to income tax. In our opinion, this argument should not be accepted. The argument proceeds on an entire misconception of the character of client's money received by a solicitor. The solicitor is the agent of the client. The client makes over the money to the solicitor for some work being done by the solicitor as his agent. The money must be employed to that purpose and must not be treated as money received for any other purpose. This position is not altered by the fact that the solicitor retains a lien upon the balance of the money for his costs. The result of solicitor having a lien on the balance of the money is no more than a person having a charge on somebody else's money. We are of the opinion that when a solicitor receives money from his client, he does not do so as a trading receipt but receives money of the principal in his capacity as an agent and that also in a fiduciary capacity. The money so received does not have any profit making quality about it when received. It remains money received by solicitor as "client's money"

for being employed in the client's cause. The solicitor remains liable to account by this money to his client."

Md. Nizamuddin, learned advocate appearing on behalf of the appellant/ revenue does not dispute that the issue has been dealt with in the case cited.

We find that as the issue is covered by the judgment of the jurisdictional court, In our view, no substantial question of law arises.

Hence, the application and the appeal are dismissed. "

3.7. We also find that the impugned issue is also squarely covered by the recent decision of the Hon'ble Delhi High Court rendered in the case of *CIT vs Om Prakash Khaitan reported in (2015) 93 CCH 0147 (Del HC) vide order dated 21.7.2015* , wherein it was held that :-

"7. In the consequent appeal by the Department, the ITAT noticed inter alia that the addition for the AY under consideration was similar to the ones made by the AO for AYs 2001-02 and 2003-04 and which had been deleted by the CIT(A) and concurred with by the ITAT. Nothing had been brought on record to persuade the ITAT to differ from the Nothing had been brought on record to persuade the ITAT to differ from the view taken by the ITAT in the Assessee's own case for those years. The ITAT also followed its earlier order dated 3rd February 2006 in ITA No.1765/Del/2002 (Jitender Sharma v. DCI) and order dated 25th August 2006 in ITA No.3820/Del/2004(M/s. Anand & Anand). The ITAT acknowledged that although res judicata was not applicable to income tax proceedings "the principle of consistency requires that unless facts or law have/has undergone a change, the view taken earlier under similar circumstances needs must be followed".

"8……. ….. ….. …… The issue of lawyers accepting monies from clients on account to defray the expenses and appropriating fees as income only upon completion of a case has been examined in the past and a consistent view has been taken by the ITAT. This has been adverted to in the impugned order of the ITAT. The principles on the basis of which those decisions were taken are unexceptional. Given the manner and functioning of the lawyers and law firms, it is correct that the cateogorisation of a receipt can take place only at the time of appropriation i.e in case of fees only when the matter is over or as when the Assessee decides on the quantum of fees. This will not be the entire advance received as at the time it is received it does not bear any particular characterisation for the purposes of treating it as income" .

3.8. Similar views were taken by the Hon'ble Bombay High Court and the Gujarat High Court in the cases of *Manilal Kher vs A G Lulla Seventh ITO & Others reported in (1989) 176 ITR 253 (Bom) and CIT vs D C Gandhi reported in (1994) 210 ITR 929 (Guj)* respectively. The operative portion therein is not reproduced herein for the sake of brevity.

3.9. Respectfully following the aforesaid judicial precedents on the impugned issue, we have no hesitation in deleting the addition made towards advance received from clients by the Learned AO in various assessment years. **Accordingly, the Ground Nos. 1-2 in ITA No. 2000 / Kol / 2010 for Asst Year 2005-06 ; Ground Nos. 1-3 in ITA No. 536 / Kol / 2011 for Asst Year 2007-08 of Assessee Appeals stands allowed and Ground No. 1 in ITA No. 2137 / Kol /2010 for Asst Year 2005-06 and Ground Nos. 1-6 in ITA No. 612 / Kol / 2011 for Asst Year 2007-08 of Revenue appeals stand dismissed.**

3.10. In respect of appeal filed by the assessee in ITA No. 758 / Kol / 2011 – Asst Year 2006-07 against the order of Learned CIT u/s 263 of the Act , we find that the Learned CIT had stated that in the earlier asst year i.e Asst Year 2005-06, the CITA had treated 10% of advances received from clients as income of the assessee and against which both the assessee as well as the department had preferred an appeal before ITAT. He states that in view of the various decisions on this issue and department's ultimate stand on this issue and the individual facts of the case, the AO is directed to re-examine this issue and take a decision after granting reasonable opportunity of being heard to the assessee. Accordingly he concludes that the order passed by the Learned AO in not bringing to tax the advances received from clients as income as erroneous in so far as it is prejudicial to the interest of revenue. We hold that the Learned CIT had not brought on record any facts or evidences to prove as to how the order passed by the Learned AO is erroneous and prejudicial to the interest of

the revenue warranting invocation of section 263 of the Act. We also hold that the Learned CIT himself had stated that several decisions have been rendered already on the impugned issue and hence it can safely be concluded that the Learned AO had only taken one of the possible views in the matter and hence placing reliance on the decision of the Hon'ble Apex Court in the case of *Malabar Industries vs CIT reported in 243 ITR 83 (SC)*, we hold that the order passed by the Learned AO is not erroneous and prejudicial to the interest of the revenue and accordingly the order u/s 263 of the Act passed on this issue is quashed. **Accordingly, the Ground Nos. 1-6 raised by the assessee in ITA No. 758 /Kol / 2011 for Asst Year 2006-07 stands allowed.**

ISSUE II – DISALLOWANCE U/S 40(a)(ia) of the Act in respect of payments to Receiver etc

4. The brief facts of this issue is that the assessee as a lawyer had engaged the services of various other lawyers and receivers and made payments to them, either as professional fees or as reimbursement of expenses , in the course of his profession. The Learned AO found during the course of assessment proceedings that the following payments were made to the following persons :-

Shri.J.P.Khaitan	*24,114*	
Shri.S.Roychoudhury	*38,250*	
Shri.Samir Roy Choudhury	*37,408*	
Shri.Tapas Kr.Banerjee	*35,700*	
	----------	*1,35,472*

4.1. The assessee stated that payments were made to Sri Tapas Kr. Banerjee for acting as an Arbitrator appointed by the Hon'ble Calcutta High Court and payments to Sri S Roychoudhury and Sri Samir Roy Choudhury as Receiver in pursuance of the orders of the Hon'ble Calcutta High Court and stated that the payments made thereon under orders of court are not payment of fees for professional services within the meaning of section 194J of the Act and accordingly the assessee had no right or obligation to

deduct income tax at source on such payments. With regard to payments made to Shri.J.P.Khaitan, the assessee stated that out of Rs. 24,114/- , a sum of Rs. 10,514/- represents reimbursement of expenses on which tax is not deductible at source and on the balance sum of Rs. 13,600/- , TDS compliance have been duly made by the assessee and hence no disallowance u/s 40(a)(ia) could be invoked. The Learned AO did not agree with the contentions of the assessee and proceeded to make disallowance u/s 40(a)(ia) of the Act on the aforesaid sum for non-deduction of tax at source which was upheld by the Learned CITA . Aggrieved, the assessee is in appeal before us on the following ground:-

> *"3. For that the learned CIT(A) erred in upholding addition of Rs.1,35,472/- U/S 40(a)(ia) of I.T Act without appreciating that out of the said sum, a sum of Rs.75,658/- was paid to Sri S.Roychowdhury, receiver appointed by the Hon'ble Calcutta High Court; Rs.35,700/- was paid as fee to the Arbitrator appointed by the Hon'ble Calcutta High Court and Rs.10,514/- was paid to a Senior Advocate towards reimbursement of expenses and the assessee was under no obligation to deduct any Income Tax at source on such payments and that the assessee had deducted and deposited income tax at source on the balance amount of Rs.13,600/-.*

4.2. The Learned AR reiterated the facts stated by him before the lower authorities and produced evidences to the fact that the concerned persons i.e Shri.Samir Roy Choudhury / S.Roy Choudhury(both parties are one and the same) and Shri. Tapas Kr. Banerjee were appointed as Arbitrator and Receiver respectively under the orders of Hon'ble Calcutta High Court. He also placed evidence on record in the form of hotel bill that a sum of Rs. 10,514/- paid to Shri.J.P.Khaitan is only reimbursement of hotel expenses on which tax is not required to be deducted at source. He also placed evidence in the form of TDS remittance challan for the balance sum of Rs. 13,600/- paid to Shri.J.P.Khaitan and accordingly pleaded that no disallowance u/s 40(a)(ia) of the Act need to be made in the facts and circumstances of the case. In response to this, the Learned DR vehemently supported the orders of the lower authorities.

4.3. We have heard the rival submissions and perused the materials available on record. We find that the assessee had paid a sum of Rs. 37,738.25 and not Rs. 37,408 (as mentioned in the assessment order) to Shri.Samir Roy Choudhury towards deficit registration charges by way of draft in favour of Additional Registrar of Assurances I Kolkata being the share of client of the assessee as directed by the Hon'ble Calcutta High Court. The necessary proof for the same is filed in page 72 of the paper book by the Learned AR. On this sum, no tax need to be deducted at source and hence no disallowance u/s 40(a)(ia) could be made.

In respect of fees paid to Shri.J.P.Khaitan, no disallowance u/s 40(a)(ia) is to be made in view of the facts stated hereinabove.

In respect of remuneration component to the receiver Shri.Samir Roy Choudhury (assessee client's share is Rs. 38,250/-) and Shri. Tapas Kr. Banerjee (Special Officer), the same are liable for deduction of tax at source in terms of section 194J of the Act. But it is not clear from the records, whether the said sums were debited by the assessee in his income and expenditure account and whether any deduction was claimed by the assessee in that regard . It is also not clear that whether the payments made to these counsels have been reimbursed to the asseseee by his clients. We hold that if there is no profit element in this activity and is mere reimbursement of expenses, then no disallowance u/s 40(a)(ia) could operate. However, there is no clarity on the same from the orders of the lower authorities. Hence we deem it fit and appropriate, in the interest of justice and fair play, to set aside this issue in respect of amounts paid to Shri. Samir Roy Choudhury and Shri. Tapas Kr. Banerjee alone , to the file of the Learned AO to ascertain whether deduction has been claimed by the assessee in respect of payments made to them and whether the same has been reimbursed to the assesee by his clients without any profit element. **Accordingly, the ground no. "3**

raised by the assessee in ITA No. 2000 / Kol /2010 for Asst Year 2005-06 is allowed for statistical purposes.

ISSUE III – Disallowance of Licence Fees – Rs. 40,500/-

5. During the course of hearing before us, the Learned Senior Counsel for the assessee informed the Bench that he is not pressing this ground and the same is considered as a Statement from the Bar. **Hence the ground no. 4 of the assessee appeal on this issue in ITA No. 2000 / Kol /2010 for Asst Year 2005-06 is dismissed as not pressed.**

ISSUE IV – Disallowance of Electricity Expenses, Telephone Expenses, Car Maintenance, Motor Car depreciation, Car expenses representing Road tax, insurance on car and interest on loan for car

6. The brief facts of this issue is that the Learned AO during the course of assessment proceedings sought to disallow certain percentage of expenses ranging from 10-15% for various assessment years in respect of aforesaid expenditure on account of personal usage of the same. On first appeal, the Learned CITA restricted the disallowance to 10% of the said expenditure as attributable to personal element. Aggrieved, the assessee is in appeal before us for the various assessment years by raising various grounds.

6.1. The Learned AR argued that in the immediately preceding assessment years i.e Asst Years 2003-04 & 2004-05, the Learned CITA restricted the disallowance to 5% towards personal element and prayed for similar direction for the Asst Years 2005-06 ; 2006-07 & 2007-08 also. In response to this, the Learned DR vehemently supported the order of the Learned AO.

6.2. We have heard the rival submissions and we find the Learned CITA had disallowed only 5% towards personal element of expenditures involved hereinabove in

the earlier years and hence his action of increasing the disallowance to 10% is without any basis. We also find that against the orders passed by the Learned CITA on this issue for the Asst Years 2003-04 & 2004-05, the revenue had not challenged this issue before tribunal. In any case, it is only an estimated disallowance. Accordingly, we direct the Learned AO to restrict the disallowance at 5% towards personal element. **Hence the Ground Nos. 4-7 in ITA No. 2000/ Kol /2010 for Asst Year 2005-06 ; Ground Nos. 3-5 in ITA No. 2001/Kol/2010 for Asst Year 2006-07 and Ground Nos. 4-6 in ITA No. 536/Kol/2011 for Asst Year 2007-08 of the assessee appeals are partly allowed.**

ISSUE V – Depreciation on Leasehold Property

7. During the course of hearing before us, the Learned Senior Counsel for the assessee informed the Bench that he is not pressing this ground and the same is considered as a Statement from the Bar. Hence the ground no. 8 of the assessee appeal on this issue in ITA No. 2000 / Kol /2010 for Asst Year 2005-06 is dismissed as not pressed.

ISSUE VI – Disallowance u/s 14A read with Rule 8D

8. The brief facts of this issue is that the assessee was in receipt of certain exempt income in the form of income u/s 10(38) on long term transfer of shares through recognized stock exchanges after suffering securities transaction tax (STT) ; income u/s 10(38) on long term gains upon sale of mutual funds after suffering STT ; tax free dividends on shares and units ; tax free interest on central government bonds upon conversion of UTI 64 ; interest on tax free bonds of public sector companies ; interest on public provident fund and interest on RBI relief bonds. During the course of assessment proceedings, the Learned AO invoked disallowance u/s 14A of the Act by applying 0.5% of investments in accordance with Rule 8D(2)(iii) of the IT Rules

directly which was also upheld by the Learned CITA. Aggrieved, the assessee is in appeal before us for Asst Years 2006-07 & 2007-08 on various grounds.

8.1. The Learned AR argued by going into each and every item of the exempt income as stated supra and stated the following :-

- With regard to long term gains on sale/transfer of shares under section 10(38), the assessee incurred substantial expenses as and by way of brokerage and other expenses and the Assessee has shown the net realization, after accounting for brokerage, securities Transaction Tax, Service tax, stamp duty etc., as long term gains on sale/transfer of shares under section 10(38). Thus, income disclosed contains an element of expenses in the form of brokerage and tax thereon, stamp duty and securities Transaction Tax (STT).
- With regard to long term gains on transfer of Mutual funds, the Assessee maintains a wealth maintenance account with Citi Bank NA. The Assessee, having an on-line Banking account facility, carried out sale transactions electronically and pursuant thereto, the Mutual Funds, lying with Citi Bank NA, were sold, On such sale, Citi Bank NA has paid STT and credited the net sale proceeds to the account of the Assessee. The Assessee has not incurred any expenses whatsoever for earning this income save and except STT.
- With regard to the tax free dividends on shares and Units, it is stated that most of the shares and Units, held by the assessee, are in demat form and the Assessee has given instructions to the Depository for crediting dividends to the account of assessee electronically. In most of the cases, the dividends were credited to the account of the Assessee. Moreover, the Assessee being a Gold Card holder of Citi Bank NA, the Assessee has made arrangement with the Citi Bank NA where under the representatives of Citi Bank NA attends the

office of the Assessee on every working day for collection of cheques. The Assessee has not incurred any expenditure even for deposit of cheques in the Bank Account.

- Similarly, no expenses whatsoever was incurred by the Assessee in receiving tax free interest income on his Public Provident Fund Account or earning interest on tax free Bonds etc.
- That the expenses claimed by the Assessee and set off against the professional income were incurred by the Assessee for earning the income from profession and no part of such expenses are attributable to tax free income earned by the Assessee.
- The plea of the Assessing Officer that the expenses relating to handling and management of such investment portfolios are hidden in the expenses debited to Profit & Loss account for earning income is a mere conjecture and without any basis. The assessee is a corporate lawyer and with his own experience and expertise has earned the tax free income. The assessee himself manages his own portfolio and none of the office staff of the assessee have any acumen or knowledge or skill or intelligence in the portfolio management or the securities transaction. It is stated that the office staff of the assessee are not in any way involved in earning of the tax free income by the assessee."

In response to this, the Learned DR argued that disallowance u/s 14A of the Act is mandatory in nature as it is applicable with retrospective effect from 1.4.1962 onwards and vehemently supported the orders of the lower authorities.

8.2. We have heard the rival submissions and perused the materials available on record in this regard. We find that the Learned AO had directly applied the provisions of Rule 8D(2)(iii) of the IT Rules, without complying with the

requirements stipulated in Rule 8D(1). For the sake of convenience, the provisions of Rule 8D(1) are reproduced herein below:-

> Rule 8D :" [Method for determining amount of expenditure in relation to income not includible in total income.
>
> *8D. (1) Where the Assessing Officer, having regard to the accounts of the assessee of a previous year, is not satisfied with—*
>
> *(a) the correctness of the claim of expenditure made by the assessee; or*
>
> *(b) the claim made by the assessee that no expenditure has been incurred,*
>
> *in relation to income which does not form part of the total income under the Act for such previous year, he shall determine the amount of expenditure in relation to such income in accordance with the provisions of sub-rule (2).*

8.3. From the above, it is evident that the Learned AO had to first record his satisfaction that the claim made by the assessee that no expenditure has been incurred for earning exempt income or the expenditure incurred by assessee is not found to be correct. We find that the Learned AO had not considered the claim of the assessee at all and he has straight away embarked upon computing disallowance under Rule 8D.

Without recording his satisfaction in terms of Rule 8D(1), he cannot directly proceed to implement Rule 8D(2) and accordingly we hold that the action of the Learned AO in making disallowance u/s 14A of the Act in the facts and circumstances of the case is not in accordance with law. We also place reliance on the decision of the *Jurisdictional High Court rendered in the case of CIT vs Ashish Jhunjhunwala in G.A.No. 2990 of 2013 ITAT No. 157 of 2013 dated 8.1.2014*, wherein it was ordered as below:-

> *"The Court: The subject matter of challenge in this appeal is a judgment and order 14th May, 2013 by which the learned Tribunal dismissed the appeal preferred by the Revenue. Aggrieved by the order of the Tribunal, the revenue has come up in appeal. The Assessing Officer applied the Thumb Rule prescribed in Rule 8D of the Income Tax Rules in exercise of power under section 14A of the Income Tax Act without first recording that he was not satisfied with*

the correctness of the claim of the expenditure made by the assessee or the claim made by the assessee that no expenditure had been incurred.

Aggrieved by the order of the Assessing Officer, an appeal was preferred before the Commissioner of Income Tax. The appeal preferred by the assessee was allowed. The Commissioner of Income Tax directed as follows:

"Therefore, he is directed to delete the disallowance made by him u/s 14A of the Act. The ground no.1 is allowed".

It is against this order of the Commissioner of Income Tax that the Revenue approached the Tribunal. The Tribunal has dismissed the appeal holding as follows:

"While rejecting the claim of the assessee with regard to expenditure or no expenditure, as the case may be, in relation to exempted income, the AO has to indicate cogent reasons for the same. From the facts of the present case, it is noticed that the AO has not considered the claim of the assessee and straight away embarked upon computing disallowance under Rule 8D of the Rules on presuming the average value of investment at ½ % of the total value. In view of the above and respectfully following the coordinate bench decision, in the case of J.K Investors(Bombay) Ltd, supra, we uphold the order of CIT(A)."

We find no infirmity in the order challenge. The appeal and the application are, therefore, dismissed".

8.4. In view of the aforesaid facts and respectfully following the decision of the Jurisdictional High Court as stated supra, we delete the disallowance made u/s 14A of the Act. **Accordingly, the Ground Nos. 1-2 in ITA No. 2001/Kol/2010 for Asst Year 2006-07 and Ground Nos. 7-8 in ITA No. 536/Kol/2011 for Asst Year 2007-08 of the assessee appeals stand allowed.**

ISSUE VII – Restriction of addition u/s 94(7) of the Act on sale of shares

9. The brief facts of this issue is that during the course of assessment proceedings, the Learned AO noted that the assessee claimed short term capital loss of Rs. 1,99,330/- and that the said loss on sale of securities was adjusted against short term capital gains of Rs. 1,93,769/- which had suffered Securities Transaction Tax (STT). The Learned

AO ignored the loss of above securities which were sold / transferred within a period of three months and since the dividend from the above securities were claimed. Further the Learned AO noted that the assessee claimed short term capital loss on purchase and sale of equity shares of Rs. 1,34,715/-

Section 94(7)

Where-
(a) any person buys or acquires any securities or unit within a period of three months prior to the record date;
[(b) such person sells or transfers-
(i) such securities within a period of three months after such date;
or
(ii) such unit within a period of nine months after such date;]
(c) the dividend or income on such securities or unit received or receivable by such person is exempt,
then, the loss, if any, arising to him on account of such purchase and sale of securities or unit, to the extent such loss does not exceed the amount of dividend or income received or receivable on such securities or unit, shall be ignored for the purpose of computing his income chargeable to tax.]"

9.1. We have heard the rival submissions and perused the materials available on record. We find that the assessee had sold certain shares within a period of three months. Before us, the Learned AR pleaded that the loss of Rs. 1,54,690/- on the shares of Federal Bank Ltd took place owing to purchase of cum Bonus Shares and sale of Ex Bonus Shares. It was also pleaded that the Learned AO had not considered the fact whether the assesee had received dividend in respect of the subject mentioned share scripts during the relevant period. It was further pleaded that in several cases, the assessee received dividend not on the shares sold but on the shares continued to be retained by him. It was also further pleaded that disallowance u/s 94(7) , if any, could be restricted only to the extent of dividend received. We hold that the Learned CITA had rightly restricted the disallowance u/s 94(7) of the Act to the extent of dividend received in accordance with the provisions of the Act and by duly appreciating the true intention behind introduction of provisions of section 94(7) of the Act. Hence we find no infirmity in the order of the Learned CITA in this regard.

Accordingly, the Ground Nos. 2-3 in ITA No. 2137/Kol/2010 of Revenue appeal stands dismissed.

10. To sum up, the outcome of the appeals of the assessee and revenue are as below:-

ITA No.	Assessment Year	Assessee's Appeal/ Department's Appeal	Result
2000/Kol/2010	2005-06	Assessee's appeal	Partly Allowed
2137/Kol/2010	2005-06	Departmental appeal	Dismissed
758/Kol/2011	2006-07	Assessee's appeal against u/s. 263	Allowed
2001/Kol/2010	2006-07	Assessee's appeal	Partly allowed
536/Kol/2011	2007-08	Assessee's appeal	Partly allowed
612/Kol/2011	2007-08	Departmental appeal	Dismissed

THIS ORDER IS PRONOUNCED IN OPEN COURT ON 6/11/2015

Sd/-
(Mahavir Singh, Judicial Member)

Sd/-
(M. Balaganesh, Accountant Member)

Date 6 /11/2015

Copy of the order forwarded to:

1.. The Appellant/Department : ACIT, Cir-54, 3 Govt Place(W), Kol-1.

2 The Respondent/Assessee- Sri Pawan Kumar Jhunjhunwala, 5th Fl., Hastings Chambers 7C Kiran Shankar Roy Road, Kol-1.

3 /The CIT,
/
The CIT(A)

FIT FOR PUBLICATION

4..

5. DR, Kolkata Bench

6. Guard file.

Sd/- Sd/-
M.S MBG
(JM) (AM)

True Copy, By order, Asstt Registrar

** PRADIP SPS