

THE INCOME TAX APPELLATE TRIBUNAL
"B" Bench, Mumbai
Before Shri B.R. Baskaran (AM) & Shri Amarjit Singh (JM)

I.T.A. No. 4041/Mum/2012
(Assessment Year 2008-09)

ACIT Circle 4(2) Room No. 642 6 th Floor Aayakar Bhavan M.K.Road Mumbai-400 020. (Appellant)	Vs.	M/s. Mehta Equities Ltd. (Formerly Shree Securities Ltd., Renaissance Mehta Equities) 612, Arun Chambers Tardeo, Mumbai-400 034. (Respondent)
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C.O. No. 17/Mum/2015
(Assessment Year 2008-09)

M/s. Mehta Equities Ltd. (Formerly Shree Securities Ltd., Renaissance Mehta Equities) 612, Arun Chambers Tardeo, Mumbai-400 034. (Appellant)	Vs.	ACIT Circle 4(2) Room No. 642 6 th Floor Aayakar Bhavan M.K.Road Mumbai-400 020. (Respondent)
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PAN No. AAACR4143C

Assessee by	Shri Neelkanth Khandelwal
Department by	Shri N.P. Singh
Date of Hearing	25.5.2017
Date of Pronouncement	31.5.2017

ORDER

Per B. R. Baskaran (AM) :-

The appeal filed by the Revenue and Cross Objection filed by the assessee are directed against the order dated 22.3.2012 passed by the learned CIT(A)-8, Mumbai and they relate to A.Y. 2008-09.

2. The assessee is a share/stock broker. Assessment was completed for the assessment year under consideration u/s. 143(3) of the Act determining the

total income at ₹ 1.97 crores by making various additions. The assessee got partial relief in the appeal filed before the learned CIT(A). The Revenue has filed this appeal challenging the relief granted by the learned CIT(A) and assessee has filed cross objection challenging the additions confirmed by the learned CIT(A).

3. We shall first take up the appeal filed by the Revenue. The only issue urged therein relates to relief granted by the learned CIT(A) in respect of insurance claimed written off.

4. We heard the parties on this issue. Facts relating to the same are stated in brief. The assessee is depository participant (DP) of Central Depository Services (India) Limited (CDSL). One of the staff of the assessee employed at Udaipur branch committed fraud by forging the signature of the customer of the assessee, under which he transferred shares belonging to the customers for his benefit. The assessee had to purchase shares worth ₹ 73.29 lakhs in order to compensate its customer. The assessee lodged insurance claim against the loss so suffered. Against insurance claim lodged by the assessee, a sum of ₹ 36.14 lakhs was received during the year ending on 31.3.2007 and further sum of ₹ 4.62 lakhs was sanctioned by the insurance company as final claim during the year under consideration. Hence the assessee wrote off balance amount of insurance claim amounting to ₹ 31.75 lakhs and claimed the same as business loss. The Assessing Officer took the view that the assessee has not complied with the provisions of section 36(2), meaning thereby, the Assessing Officer treated the claim as a claim of bad debt. The learned CIT(A) noticed that the claim falls under the category of business loss and accordingly allowed the claim.

5. Learned Departmental Representative strongly supported the order passed by the Assessing Officer on this issue and learned AR strongly supported the order passed by the learned CIT(A).

6. Having heard the rival submissions, we are of the view that the decision taken by the learned CIT(A) on this issue does not call for any interference as the learned CIT(A) has considered the same as business loss allowable u/s. 28 of the Act. For the sake of convenience, we extract below the operative portion of the order passed by the learned CIT(A) :-

4.4 I have considered the contention of the AO as well as of the Ld. AR. There is no dispute on the facts as stated above by the Ld. AR and the fact, that CDSL by their letter dated 15th May, 2007 has stated that the amount given by the insurance company is in full and final settlement of the appellants claim. This letter has been received by the appellants during the year under reference. Thus, in my considered opinion the loss is a business loss and is correctly claimed by the appellants during the year and the same does not pertain to any of the earlier years. I find strength from the Apex com decision relied on by the Ld. AR in the case of Associated Banking Corporation India Ltd reported in 56 ITR 1 which has held as follows :-

The embezzlements undoubtedly took place in the year of account ending June 30, 1947. The secretary misused the powers conferred upon him under the power of attorney and withdrew ₹ 18,00,000 by posting entries in the names of persons who did not exist, or who had no dealings with the bank. But until an investigation of the dealings of the bank was made, the embezzlements could not come to the knowledge of the directors of the bank or the liquidator. The bank had to pay ₹ 10,15,000 to its constituents to satisfy the liability arising out of the secretary's dealings with the funds of the bank. Loss has, therefore, been suffered by the bank as a result of the withdrawals made by the secretary, and the only question relevant for the purpose of the appeal is whether the loss occurred in the year of account ending June 30, 1947.

It was urged by counsel for the liquidator that loss occurs to a banking institution when funds are withdrawn or misapplied by an agent or servant and misappropriated, and therefore the withdrawals or misapplication by the secretary having taken place in the year of accounting, the loss was admissible as an allowance in the year of account against the profits of that year. We are unable to agree with that contention. A claim to deduct an amount lost to the assessee because of embezzlement by this agent does not fall within the description of any allowance under clauses (1) to (xv) of sub-section (2): to be admissible it must, if at all, fall within sub-section (1). This position was conceded in the High: court, in our judgment properly, by counsel for the bank. The problem as to when loss resulting from misapplication of funds by an agent occurs must be viewed like many other problems arising under the Income Tax Act on a conspectus of all the facts and circumstances in the context Of principles of commercial trading. Embezzlement of funds by an agent, like a speculative adventure, does not necessarily result in

loss immediately when the embezzlement takes place, or the adventure is commenced. Embezzlement may remain unknown to the principal, and the assets embezzled may be restored by the agent or servant. In such a case in a commercial sense no real loss has occurred. Again it cannot be said that in all cases when the principal obtains knowledge of the embezzlement the loss results. The erring servant may be persuaded or compelled by process of law or otherwise to restore wholly or partially his ill-gotten gains. Therefore, so long as a reasonable chance of obtaining restitution exists, loss may not in a commercial sense be said to have resulted.

4.5 Similarly, the decision of Special Bench at Chandigarh in the case of Gulati Saree Centre reported in 71 ITD 73 (Chd) (SB) also supports the claim of the appellants. I, thus, direct the AO to allow the claim of the appellants write-off of insurance ₹ 31,75,588. This ground of appeal is allowed”.

7. We noticed that the Assessing Officer has wrongly treated the claim as claim of bad debt and hence he has disallowed the claim. Since the learned CIT(A) has correctly appreciated that the impugned claim is a case of business loss, we do not find any infirmity with the order passed by him on this issue.

8. We shall now take up the Cross objection filed by the assessee. First issue relates to disallowance made u/s. 14A read with Rule 8D of the I.T. Rules. We noticed that the Assessing Officer has applied provisions of Rule 8D(2)(iii) of the I.T. Rules to compute the disallowance at ₹ 88,145/-. The said disallowance was confirmed by the learned CIT(A) also.

9. Learned AR submitted that most of the investments held by the assessee have been brought forward from the earlier years and hence the Assessing Officer was not justified in mechanically applying provisions of Rule 8D(2)(iii).

10. On the contrary, learned Departmental Representative submitted that the assessee has not only sold shares held as opening balance but also purchased new shares. Since there is good amount of activities in the investment portfolio and since the assessee did not maintain separate books of account, the Assessing Officer does not have any other option but to apply provisions of Rule 8D of the I.T. Rules.

11. Having heard the rival submissions, we are of the view that there is merit in the claim of the Ld D.R. The assessee did not maintain separate books of account for its investment portfolio. The assessee has sold shares brought forward from earlier years and also purchased new shares, which means there is good amount of activities in the investment portfolio. Under these set of facts, we are of the view that the Assessing Officer was justified in applying provisions of Rule 8D to the facts of the present case. Accordingly, we uphold the order passed by the learned CIT(A) on this issue.

12. Next issue contested by the assessee relates to the disallowance of employees contribution to provident fund amounting to ₹ 42,869/-. Learned AR submitted that the assessee has remitted the same before the due date of filing the return of income and hence the same is allowable as per the decision rendered by Hon'ble Jurisdictional High Court in the case of Ghatke Patil Transports (368 ITR 749)(Bom).

13. We have heard learned Departmental Representative on this issue. We prefer to set aside matter to the file of the Assessing Officer with the direction to examine the claim of the assessee and take appropriate decision by following decision rendered by Hon'ble Bombay High Court in the case of Ghatke Patil Transport (supra).

14. Next issue urged by the assessee relates to disallowance of insurance claim written off which has already been disposed of by us while disposing the appeal of the Revenue above.

15. In the result, appeal filed by the Revenue is dismissed and Cross Objection filed by the assessee is treated as partly allowed.

Order has been pronounced in the Court on 31.5.2017.

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(B.R.BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated : 31/5/2017

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

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BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai