

आयकर अपीलीय अधिकरण, सी खंडपीठ मुंबई

INCOME TAX APPELLATE TRIBUNAL, MUMBAI - C BENCH

सर्वश्री राजेन्द्र, लेखा सदस्य एवं पवन सिंह न्यायिक सदस्य

Before S/Sh. Rajendra, Accountant Member & Pawan Singh, Judicial Member

आयकर अपील सं./ITA No.4591/Mum/2005, निर्धारण वर्ष/Assessment Year-2001-02

Assistant Commissioner of income Tax , Range-7(2), Room No. 624, 6 <sup>th</sup> floor Aayakar Bhavan, M. K. Road, Mumbai-400020.	Vs	M/s Synergy Log-in System Ltd (Presently known as M/s Secure Earth Technologies Ltd) 407, Dalamal Tower, Nariman Point, Mumbai -400021 PAN:AAGCS2008H
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

राजस्व की ओर से/ Revenue by : Sh. Vijay Kumar Soni (DR)

निर्धारिती ओर से/Assessee by : None

सुनवाई की तारीख/ Date of Hearing : 30-06-2016

घोषणा की तारीख / Date of Pronouncement : 16-09-2016

**ORDER/आदेश**

**न्यायिक सदस्य पवन सिंह के अनुसार PER PAWAN SINGH, JM**

1. This appeal by revenue under section 253 of the Income Tax Act 1961("Act") is directed against the order of Commissioner of Income Tax (Appeals ) ( ' CIT(A')-VII, Mumbai dated 29 March 2005 for the Assessment Year (AY) -2001-02. The Revenue has raised the following grounds of appeal:

*"1. On the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in allowing bad debts of Rs. 50,08,706/- in respect of software division and Rs.85,86,006/-in respect of finance division.*

*2. On the facts and in the circumstances of the case and in law, the ld CIT(A) erred in deleting the interest and finance charges of Rs. 50,85,165/- alleged to be due to Federal Bank, ignoring the fact that same is provision.*

*3. On the facts and in the circumstances of the case and in law, the ld CIT(A) erred in allowing Rs. 40,87,000/-as a business loss.*

*4. On the facts and in the circumstances of the case and in law, the Learned CIT(A) erred in deleting the disallowance of Rs. 33,07,415/-in respect of payments towards PF and ESIC which were beyond due date."*

2. The facts necessary for adjudication of the issues raised in the present appeal as gathered from the record are that the assessee filed return of income for relevant assessment year on 31<sup>st</sup> of October 2001 declaring total income as of Rs Nil. The assessment was framed by the assessing officer under section 143 (3) of the Act. While framing assessment order the AO besides the other addition and disallowance, the AO made the disallowance of bad debt of Rs. 50,08,706/-in respect of Software division and Rs. 85,86,006/- in respect of finance division, disallowed interest and finance charges of Rs. 71,87,454/- due to Federal Bank,

disallowed business loss of Rs 40,87,000/- and further disallowed a sum of Rs.33,07,415/- for making payment of ESIC & PF beyond the due date. Felling aggrieved, the assessee filed an appeal before the Commissioner of Income Tax Appeals. The Ld CIT (A) partly allowed the appeal of the assessee and deleted the disallowance of bed debts, business loss payments of PF & ESI. And further deleted the disallowance of Rs. 50,85,165/- out of total disallowance of Rs.71,87,454/- on account of interest and finance in the impugned order. Thus, aggrieved by the order of Ld CIT(A) the Revenue has filed the present appeal before us.

3. None appeared on behalf of assessee when the appeal was called for hearing on 30.06.2016. Despite waiting for sufficient time none came forward to make submission on behalf of assessee. Perusal of the record reveals that nobody is appearing on behalf of assessee from last several dates despite service of notice of present appeal. Thus, we have no option except to hear the appeal ex-parte in the absence of representative of assessee. We have heard Id DR for revenue/ appellant and perused the record.

First ground of the appeal is with regard to deletion of bed debts of software division and finance division. Ld DR for revenue argued that assessee has not furnished any evidence for seeking the deduction on account of bed debts for software expenses and in respect of finance division. Ld DR for revenue further argued that the order of AO may be restored and that order of Id CIT (A) be reversed.

4. We have considered the contention of the Id DR for revenue. The AO discussed the disallowance of bed debts in para-3.3 of its order. The Assessing Officer while making disallowance of bed debts observed that assessee has not produced any evidence to prove that the debtors have become bed during that year. The AO concluded that even after amendment to section 36(1)(vii) while claiming deduction of bed debts, which is written off, the assessee has to established that it has become bed. During the first appellate proceeding, the Id appellate authority observed that there is no precondition for claiming bed debts, or to show that bed debts have become actually bed. It was further observed that details of individual accounts of bed debts both in respect of software as well as finance division shows that income in respect of these debtors have already accounted for in earlier years and the bed debts claimed by the assessee have been written off. The statements of account of respective debtors were examined by Id CIT Appeals. The Id CIT(A) concluded that there is no requirement of establishing that the debts have become bed, so far as the bona fides of the assessee is not in doubt. The assessee had come with an honest conclusion that beds have become irrecoverable and that the cost of recovery of the Debts would be much more than

the debts as such. As there is no precondition that assessee has to produce infallible evidence to prove that the debts have become actually bed and deleted the disallowance. We have seen that learned CIT(A) considered the material available before him and analyse the fact and accordance with the provisions of section 36(1) (vii) of the Act. The power of first appellate authority is co-terminus while hearing the appeal. As there is no requirement to prove the facts before the revenue authority and to produce infallible evidence about bed debts. The order of Learned CIT(A) is reasoned one and does not suffer from any illegality or infirmity. Thus this ground of appeal raised by revenue is dismissed.

5. Second ground of appeal for our consideration is with regard to deleting the interest and finance charges of Rs. 50,85,165/-. Ld DR for revenue argued that that the assessee made mere provision in the statement of account and it relates to the interest and finances of earlier years. The AO made the disallowance after carefully examining the audit report furnished by assessee. Ld Departmental Representative prayed that the order of AO may be restored and the order passed by ld CIT(A) be set aside.

We have considered the contention of the Ld DR for revenue and further seen the order of authorities below. The AO while making the disallowance observed that the assessee made the mere provisions for expenses the interest and finances charge related to earlier years. Ld CIT (A) while considering this ground observed that assessee filed complete detail of expenses which includes interest and finances charges in respect of SBI capital market, interest of Rs. 50,85,165/- in respect of cash credit, loan from Federal Bank and interest on intercorporate deposit from Sowmya and Srinivas family, interest on term loan from Citibank and Standard Chartered bank and incentive salary and expressive payment to employee. The Learned CIT(A) while deciding this ground made the following observation:

*“(c) As far as the interest on cash credit loan from Federal Bank is concerned, the Learned counsel submitted that the amount of Rs.50,85,165/- represents a negotiated a statement of interest claim and debited by the Federal Bank to assessee’s account. It was submitted that the Federal Bank has actually claimed much more interest than the sum of Rs. 50,85,165/- ultimately settled. It was submitted that since the statement has been raised in the previous year under consideration, the sum of Rs. 50,85,165/- has been claimed in this year.*

*From the perusal of the correspondence regarding the statement of the interests settled with Federal Bank, it is clear that the assessee has correctly claimed deduction on account of interest of Rs. 50,85,165/-. The assessee has sent a detailed letter dated 2 August 2000, which date falls in the previous year under consideration accepting the statement of the interest calculated at 14% of the loan amount outstanding from the federal bank. From an earlier letter dated 14, Feb,2000, written by the Federal Bank to the assessee. It is seen that the bank has claimed interest at the rate of 21.42%. The Learned counsel has also filed*

*some of the copies of its bank account showing actual debit of negotiated interest in its bank account in view of this, the disallowance to the extent of Rs.50,85,165/- made by assessing officer is hereby deleted.”*

The Ld DR for revenue has not argued that there is any perversity in the finding of Ld CIT (A) with regard to the appreciation of facts. Further the interest claimed by the Federal Bank is not disputed by revenue. The finding of CIT(A) are based on evidence placed before him, which does not suffer from any illegality which may require any interference at our end. Thus this ground of appeal raised by assessee is dismissed.

6. Third ground of appeal is with regard to disallowance of business loss of Rs.40,87,000/- paid to M/s Overseas Sanmar Finance Ltd. Learned DR for revenue argued that the amount received by the assessee from M/s Overseas Sanmar Finance Ltd was capital in nature. It was further argued that there was no intimation of merchant banking of the assessee. The deletion of the disallowance is not in accordance with the provisions of the law.

We have considered the submission of departmental representative and gone through the orders of authorities below. While making the disallowance the AO observed that it was submitted before him that as a part of merchant banking activities, assessee has taken up a proposal for making initial public offer of M/s Kolshet Ispat Udyog Ltd Mumbai. As per SEBI regulations, the lead managers i.e. assessee was to take part and invest in the proposal, the assessee had therefore approached M/s Overseas Sanmar finance Ltd as a co-investor and enters into an agreement with them. However, because of minimum paid-up limits by SEBI for initial listing of Rs. 10 crore, M/s Overseas Sanmar Finance Ltd insisted on the assessee to buyback the share and returned the amount advanced with interest. As the assessee was in the financial difficulty and requested for a lower amount for settlement and MOU was signed to reach the settlement and the assessee agreed to pay Rs. 40.87 lacs against the amount of Rs. 60 lakhs. AO concluded that the amount received from M/s Overseas Sanmar Finance was capital advanced for investment in shares as lead managers and the fact that the said agreement the applicable in the amount was rebuilt on some dispute will not alter the nature of transaction, thus disallowed the amount of Rs. 40,87,000/-. The similar contention was urged before the first appellate authority and it was submitted that the loss of Rs. 40.87 Lacs is incurred in the course of assessee's business of merchant banking activity. In support of its contention, the assessee furnished copy of memorandum of understanding entered in 1995 with M/s Kolshet Ispat Udyog Ltd, wherein the assessee as a lead being merchant/ selling placement banker has agreed to buy the share to be issued by the issuer M/s Kolshet Ispat Udyog Ltd,(KIUL) wherein the assessee agreed to subscribe to

equity share at the issue price of Rs. 15 per share aggregating to Rs. 4,05,00,000/-. And as per the clause 4 of MOU the entire subscription was to be paid within 30 days from the date of signing of the said memo of understanding. The assessee also filed a copy of letter dated 1<sup>st</sup> Dec 97, wherein KIUL making a counterclaim on the assessee for default on its part in respect of term of memo understanding as lead buyers. The copy of MOU dated 31 October 2000 between the assessee and M/s overseas seminar finance Ltd mentioned therein that as per agreement dated 12 August 95, was also filed. The assessee has to buyback the entire lot of equity share from M/s Overseas Sanmar finance Ltd and that in this regard. M/s overseas Sanmark finance Ltd had filed a Company Petition No 824 of 1997, in the High Court of Bombay for winding up the assessee company. The MOU mentioned that both the parties are desirous for out-of-court settlement and as a part of that the assessee agreed to pay a sum of Rs. 40.87 Lacs as a settlement charges, the assessee also filed a copy of the receipt of the payment of various trades sign in this regard. The assessee also filed a syndication fees accounts for AY 97-98, which show that assessee has accounted for and income of Rs 850,000/- from M/s KIUL on account of bought out deal. After considering the above referred contention and the documentary evidences of assessee the learned CIT (A) concluded that the assessee has paid the amount of Rs. 40.87 Lacs in the previous year under consideration. In view of the settlement dated 31 October 2001, arising out of Merchant Banking Activity of the assessee company, it was a clear loss of Rs. 40,87,000/-. As the loss incurred in the course of business activities of Merchant Banking, thus, it is clearly allowable as a business loss and the disallowance made by AO was deleted. We have seen that Learned CIT(A) considered the nexus of business of assessee visa-viz the Merchant Banking. The assessee suffered loss in the course of its business activity. The assessee paid the amount suffered as a business loss and term of memo of understanding. The assessee has shown the sufficient evidence regarding the payment of settlement about to M/s Overseas Sanmar Finance Ltd during the previous year. The payment so made by the assessee to M/s Overseas Sanmar Finance Ltd due to the non-fulfilment of obligation in the course of activities of Merchant Banking. The order of Commissioner Appeals does not suffer from any perversity or infirmity, thus the ground of appeal raised by revenue is dismissed.

7. Fourth ground of appeal for our consideration is with regard to the deletion of disallowance of Rs 33,07,415/- in respect of payment towards PF and ESIC. Ld DR for revenue argued that assessee deposited the contribution of ESI and PF after its due date and the same was rightly disallowed by the AO. Ld DR prayed for restoring order of AO and for reversing the finding of Learned CIT(A).

We have considered the contention of Id departmental representative and perused the orders of authorities below. We notice that Learned CIT(A) observed that all the payments with regard to the ESI and PF were made before due date of filing of income tax return. The order of first appellate authority further reveals that as per the contents of the Tax Audit report, the payments of contribution of PF and ESI were made before due date of filing of return of income. The Learned CIT(A) in its finding relied upon the decision of Hon'ble Apex Court in case of Allied motors (224 ITR 677(SC) ) and the decision of Mumbai Tribunal in case of JCIT Versus Devidayal Sales Private Limited in ITA No. 778/M/99 dated 29 October 2003. Now it is settled position of law, that if the contribution of ESI and PF are made before the due date of filing of return of income, no disallowance under section 43B of the Act can be made. Thus, we do not find any illegality or infirmity in the order for deleting the disallowance on account of delay in deposit of contribution for ESI and PF. This ground of appeal is also failed.

8. In the result, appeal filed by revenue is dismissed.

Order pronounced in the open court on this day 16<sup>th</sup> of September 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक 16.09.2016 को की गई ।

(राजेन्द्र /RAJENDRA)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई/Mumbai,दिनांक/Date: 16.09.2016

**SK**

**आदेश की प्रतिलिपि □ ग्रेषित/Copy of the Order forwarded to :**

1.Appellant /अपीलार्थी

2. Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त,

4.The concerned CIT /संबद्ध आयकर आयुक्त

5.DR "C" Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, सी खंडपीठ,आ.अ.न्याया.मुंबई

6.Guard File/गार्ड फाईल

(पवन सिंह /PAWAN SINGH)

न्यायिक सदस्य / JUDICIAL MEMBER

आदेशानुसार/ **BY ORDER,**

उप/सहायक पंजीकार Dy./Asst. Registrar

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.