

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E", MUMBAI
BEFORE SHRI G.S.PANNU, ACCOUNTANT MEMBER
AND
SHRI C.N.PRASAD, JUDICIAL MEMBER
ITA No.5782/MUM/2016 (AY. 2010-11)

Income-tax Officer,
Ward -1(1)(3),
Room No.531A,
Aaykar Bhavan,M.K.Road,
Mumbai 400 020

..... Appellant

Vs.

M/s. Eminent Travels Pvt. Ltd.,
501, Arihant Apartment,
M.V.Pandloskar Marg,
Vile Parle(E)Mumbai -400 057
PAN: AAACE 2507M

.... Respondent

Appellant by : Shri M.C. Omi Ningshen
Respondent by : Dr. K.Shivram &
Ms. Neelam Jadhav

Date of hearing : 05/04/2017
Date of pronouncement : 26/04/2017

ORDER

PER G.S.PANNU,A.M:

The captioned appeal filed by the Revenue pertaining to assessment year 2010-11 is directed against an order passed by CIT(A)-2, Mumbai dated 29/06/2016, which in turn, arises out of an order passed by the Assessing Officer under section 143(3) of the Income Tax Act, 1961 (in short 'the Act') dated 12/03/2013.

2. The Revenue has raised the following Grounds of appeal:-

1. *"Whether, on the facts and the circumstances of the case and in law, the Ld. CIT(A) is justified in allowing the set-off of carried forward business losses against the Short Term Capital Gains in view of provisions of Section 72 of the IT. Act"*
2. *"Whether, on the facts and the Circumstances of the case and in law, the Ld. CIT(A) was correct in allowing expenses of professional fees, ROC, Audit fees and Tax Audit fees of Rs. 1,18,772/- against income from other sources even though there was no business activity during the year and ROC expenses claimed pertains to prior period."*
3. *"The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the Assessing officer resorted."*

3. In so far as the first Ground of appeal is concerned, the relevant facts are that the respondent assessee was engaged in the business of travel agency, which had since been closed down w.e.f. August, 2007 and during the year under consideration no business activity was carried out. In the return of income, assessee had declared profit on sale of office premises amounting to Rs.48,91,949/- against which, assessee claimed set-off of brought forward business losses of assessment years 2006-07,2007-08 and 2009-10 amounting to Rs.31,01,347/-. The Assessing Officer denied the aforesaid set-off primarily on the ground that the profit on sale of office premises cannot be assessed as 'income from business'. According to the Assessing Officer, the opening WDV of the block of assets of office premises as on 01/04/2009 was Rs.17,85,145/- and the block of assets ceased to exist as on 31/03/2010, after the sale of office premises by the assessee. The Assessing Officer held that the profit on sale of office premises was on account of a depreciable asset and, therefore, the same was to be governed by the provisions of section 50 of the Act; thus, the Assessing Officer treated the gain on sale of office premises as short term capital gain, being a gain arising from transfer of depreciable asset by relying on section 50 of the Act.

Accordingly, the brought forward business losses were not allowed to be set-off against short term capital gain. The CIT(A) has since allowed the claim of the assessee. The CIT(A) observed that section 72 of the Act permits set-off of the brought forward business losses against the gains of business and that there was no requirement that such gain ought to be taxable under the head 'profits and gains of business or profession'; and, that so long as the gain is on account of any business carried on by the assessee, such set-off could not be denied. In coming to such a decision, the CIT(A) has relied upon the decision of the Mumbai Tribunal in the case of Digital Electronics Ltd. vs. CIT(2012) 49 SOT 65 (Mum). Against such a decision of the CIT(A), Revenue is in appeal before us.

4. Before us, the Ld. Departmental Representative reiterated the stand of the Assessing Officer that on account of section 50 of the Act, gain arising on transfer of a depreciable asset was deemed to be short term capital gain and, therefore, in terms of section 72 of the Act brought forward business losses could not be set-off against the short term capital gain earned on sale of office premises.

5. On the other hand, the Ld. Representative for the assessee has defended the order of the CIT(A) and pointed out that the decision of the Tribunal in the case of Digital Electronics Ltd. (supra) relied upon by the CIT(A) has impliedly been approved by the Hon'ble Bombay High Court in the decision rendered in the case of CIT vs. M/s. Hickson & Dadajee Pvt. Ltd. in ITA No. 1493 of 2014 dated 28/02/2017, a copy of which was placed on record.

6. We have carefully considered the rival submissions. In so far as it is relevant for our purpose, it is noticeable that section 72 of the Act prescribes set-off of unabsorbed business loss against the profits and gains of any business or profession carried on by the assessee and assessable for that assessment year. In the present case, the issue is with respect to the business losses of assessment years 2006-07, 2007-08 and 2009-10, which have been brought forward and assessee had sought set off of the same against the profit earned in this year on sale of office premises. The claim has been opposed by the Revenue primarily on the ground that in the instant year no business has been carried out, and thus profit on sale of premises is not assessable under the head 'profits and gains of business and profession'. Quite clearly, section 72(1) of the Act does not prescribe that in the year of set-off the income in question be assessable under the head 'profits and gains of business or profession' and thus, considering the phraseology of the section, it would be sufficient if such income is of the business or profession carried on by him. Therefore, the objection of the Assessing Officer that the gain on sale of office premises was assessable as short term capital gain is of no avail to deny the set-off envisaged under section 72 of the Act because in commercial sense, the gain on sale of office premises represents profits of business. The said proposition was applied by our Co-ordinate Bench in the case of Digital Electronics Ltd. (supra), which has since been followed by the CIT(A) in the present case. The Hon'ble Bombay High Court in the case of M/s. Hickson & Dadajee Pvt. Ltd(supra) was considering the appeal of the Revenue, inter-alia, on the following question of law:-

“(i)Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in allowing set off of brought forward business loss against deemed short term capital gains arising from sale of building and plant and machinery?”

The Hon'ble Bombay High Court approved the stand of the assessee and negated the stand of the Revenue. The Hon'ble Bombay High Court also noted that there was no requirement of section 72 of the Act that such gains of business shall be taxable under the head 'profits and gains of business or profession' and, therefore, upheld the decision of the Tribunal holding that the brought forward business loss can be set off against profits of any business or profession including the profit on sale of building and plant & machinery. Following the aforesaid parity of reasoning, in the present case also, the brought forward losses are eligible for set-off against short term capital gain on sale of office premises. Therefore, the decision of the CIT(A) is justified and is hereby affirmed. Thus, on this aspect the Revenue fails.

7. In so far as the next Ground is concerned, the same relates to the expenses of Rs.1,18,772/- incurred by the assessee on account of professional fee, ROC expenses, audit fee and tax audit fee. The Assessing Officer denied the deduction for aforesaid expenses on the ground that there was no business income and assessee's only income is by way of interest, dividend and miscellaneous income which were assessable under the head 'income from other sources'. The CIT(A) has allowed the claim of the assessee.

8. On this aspect, we find that the CIT(A) has noted that the impugned expenses are statutorily required to be incurred and, therefore, the same was allowable. In our considered opinion, the CIT(A) made no mistake in

allowing the claim of the assessee because even in the absence of regular business activity, such expenses are required to be statutorily incurred and, therefore, the same are allowable against the assessed income. Thus, on this aspect also the order of the CIT(A) is hereby affirmed.

9. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on 26/04/2017

Sd/-
(C.N.PRASAD)
JUDICIAL MEMBER

Sd/-
(G.S. PANNU)
ACCOCUNTANT MEMBER

Mumbai, Dated 26/04/2017
Vm, Sr. PS

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//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai