

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, बी, मुंबई ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "B", MUMBAI**

श्री जोगिन्दर सिंह, न्यायिक सदस्य एवं

श्री राजेश कुमार, लेखा सदस्य, के समक्ष

**Before Shri Joginder Singh, Judicial Member, and
Shri Rajesh Kumar, Accountant Member**

**ITA NO.4531/Mum/2012
Assessment Year 2002-03**

Asst. Commissioner of Income Tax-18(1), 1 st Floor, Piramal Chambers, Lalbaug, Mumbai-400012	बनाम/ Vs.	Madhurkar Sheth, 603/604, Elizabeth Apts, B.S.M. Road, Elphiston(W), Mumbai-400018
(राजस्व /Revenue)		(निर्धारिती /Assessee)
PAN. No.ANXPS1972P		

निर्धारिती की ओर से / Assessee by	Shri R.K.Singh
राजस्व की ओर से / Revenue by	Shri Vijay Kumar Soni

सुनवाई की तारीख / Date of Hearing :	21/10/2015
आदेश की तारीख /Date of Order:	05/11/2015

आदेश / O R D E R

Per Joginder Singh (Judicial Member)

The Revenue is aggrieved by the impugned order dated 30/04/2012 of the Id. First Appellate Authority, Mumbai, deleting the disallowance of Rs.2,96,80,379/- on account of bad debts without appreciating that the assessee is not entitled to bad debts u/s 36(1)(vii) r.w.s 36(2) of the Income Tax Act, 1961 (hereinafter the Act) for the reason that the

amount of Rs.2,96,80,379/- represents value of shares, lying with M/s Seth Securities Pvt. Ltd. and is not income offered by the assessee in profit & loss account in earlier years or in current years.

2. During hearing, ld. DR, Shri Vijay Kumar Soni, advanced his arguments which are identical to the ground raised. On the other hand, Shri R.K.Singh, ld. counsel for the assessee defended the conclusion arrived at in the impugned order by contending that the Tribunal, vide order dated 06/10/2010 (ITA No.2016 & 2089/Mum/2006) sent the matter to the file of the Assessing Officer with a direction to verify and ascertain the exact quantum of deduction on account of said bad debts after taking into consideration any security available with the assessee in the form of margin money or the relevant shares purchased by him on behalf of the clients but remained to be transferred in their names. It was also pointed out that against the order of the Tribunal, the department went to the Hon'ble High Court, wherein, the appeal of the department was dismissed.

2.1. We have considered the rival submissions and perused the material available on record. Before coming to any conclusion, we are reproducing hereunder the relevant portion from the aforesaid order of the Tribunal dated 06/10/2010 for ready reference:-

“These two appeals, one by the assessee being ITA No. 2016/M/06 and other by the Revenue being ITA No. 2089/M/06, are cross

appeals which are directed against the order of ld. CIT(A) XIV, Mumbai dtd. 30.12.05.

2. The grievance of the assessee as projected in ground No. 1 of his appeal is that the ld. CIT(A) has erred in assuming that the issue relating to his claim for long term capital loss of Rs. 1,32,82,960/- was not pressed much on behalf of the assessee and thereby disallowing the same to be carried forward for set off in the subsequent years.

3. The assessee in the present case is an individual who is engaged in the business of share trading and share broking. The return of income for the year under consideration was filed by him on 29.10.02 declaring a loss of Rs.92,51,215/-. In the said return, long term capital loss of Rs.1,32,82,960/- arising from sale of shares of M/s SSPL was claimed by the assessee. In this regard, it was submitted that the assessee was a director of the said Pvt. Limited Company which was incorporated on 6.9.94. It was stated that the said company became a defaulter as declared by the National Stock Exchange (NSE) in the year 2001 and winding up petition therefore was filed by the NSE u/s 434 of the Companies Act. It was contended that net worth of the shares of the said company thus had become negative and a certificate issued by the Chartered Accountant to this effect was filed by the assessee in support. It was claimed that 899900 shares held by the assessee in the said company with cost of acquisition of Rs.94.88 lacs were sold for Rs. 9000/- and after reducing the indexed cost of acquisition of the shares from the said sale consideration, long term capital loss of Rs.1,32,82,960/- was claimed. The certificate of the Chartered

Accountant filed by the assessee in support of his claim that the share value of SSPL had become negative was not found to be reliable by the A.O. in the absence of any working given by the Chartered Accountant of the net worth of SSPL. According to the A.O., a prudent businessman would never dispose of such huge quantity of shares at through-away price of Rs. 9000/-. He held that the transfer of sale of shares thus was claimed by the assessee with a motive to book long term capital loss and holding the same to be sham transactions made with an intention to defraud the Revenue, he disallowed the claim of the assessee for long term capital loss.

4. The matter was carried before the Id. CIT(A) who disposed of the appeal of the assessee on this issue vide para No. 6.3 of his impugned order which reads as under:

“I have considered the facts and rival submission put forward by the Appellant and the Assessing Officer in his assessment order. It is not disputed that the company has been facing with winding up petition by NSE in the court of law. It is also not disputed that because of huge losses, the company had not paid its dues to the NSE. The assessing Officer is also silent to move any further comment/enquiry in his Remand Proceeding. He has not even initiated any step to at least call for further particulars from the Appellant to establish the facts, leave aside the point whether the securities are dealt in stock exchange or not. I find that due to the steps taken by the NSE to declare SSPL as defaulter the appellant had acted in a prudent manner to sell the shares at whatever prices available. No doubt the dealings are not through Stock Exchange because it is a case of shares of private limited company. The appellant had produced entire particulars of materials before me to

substantiate his claim. The appellant vide his letter dated 15.03.2005 has filed in Paper Book page No. 139 has furnished the entire set of details explaining how this share were acquired and how the same have been sold alongwith the balance sheet of SSPL and certificate of the Chartered Accountant. The same are to be found in the page No. 139 to 147. However, I also find the appellant in his grounds of appeal states that there is no immediate benefit to the appellant in claiming long term capital loss. In spite of being a genuine loss, the same was never adjusted against the long term capital gains. As in the assessment stage and in the appellate stage the appellant has not pressed much due to lack of immediate benefit. I am of the opinion that since the appellant have not pressed much, his claim of long term capital loss of Rs. 1,32,82,960/- is ignored and dismissed.”

5. Referring to the above para No. 6.3 of ld. CIT(A)'s impugned order, the ld. Counsel for the assessee has submitted before us that the issue relating to his claim for long term capital loss was never given up by the assessee and merely because the same was not adjusted against the long term capital gains in the subsequent years, the ld. CIT(A) was not correct in presuming that the said claim was not pressed much by the assessee. He has agreed while giving a reply to the query raised by the Bench that the said long term capital loss is allowed to be carried forward for set off against long term capital gain only for a period of 8 years immediately succeeding the relevant A.Y. and he is not very sure whether the assessee has claimed any set off of the said loss up to A.Y. 2010-11. However, as rightly contended by him, the issue relating to the assessee's claim for such long term capital loss for the year under consideration has to be decided on merits independent of whether

the assessee has claimed any set off of the said loss in the subsequent year. In this regard, it is observed that although the ld. CIT(A) by his impugned order has virtually accepted the stand of the assessee on the merit of this issue, he has not rendered any specific decision thereon ultimately. Moreover, a perusal of the relevant portion of his impugned order shows that certain documents and details relating to his claim for long term capital loss were furnished by the assessee for the first time before the ld. CIT(A) along with the balance sheet of SSPL. We, therefore, deem it fair and proper and in the interest of justice to restore this issue to the file of the A.O. with a direction to decide the same on merits in the light of the said documents and details filed by the assessee before the ld. CIT(A) after giving the assessee a sufficient and proper opportunity of being heard. Ground No. 1 of assessee's appeal is accordingly treated as allowed for statistical purpose.

6. Ground No. 2 of the assessee's appeal and the solitary ground raised in Revenue's appeal involve a common issue relating to the disallowance of assessee's claim for deduction of Rs. 3,71,83,708/- on account of bad debts which stands restricted by the ld. CIT(A) to Rs. 1,15,56,860/-.

7. In the return of income, deduction of Rs. 3,71,83,708/- was claimed by the assessee on account of bad debts written off u/s 36(1)(vii) r.w.s. 36(2). The said amount was claimed to be receivable by the assessee from various parties including a sum of Rs. 1,15,56,860/- receivable from BSE Clearing House. The A.O., disallowed the claim of the assessee for the said deduction by giving independent reasons in respect of each and every debt

claimed by the assessee as bad to justify the same. The ld. CIT(A), however, deleted the said disallowance made by the A.O. in respect of all the debts claimed by the assessee as bad except the debt receivable from BSE Clearing House mainly on the ground that the loss on account of said debts becoming bad had been suffered by the assessee in the course of his business of share broking and share trading. The disallowance made by the A.O. on account of bad debts to the extent it was related to BSE Clearing House amounting to Rs. 1,15,56,860/-, however, was confirmed by the ld. CIT(A) for the following reasons given in para No. 8.3 of his impugned order:

“I have considered the facts, submission of the appellant and the view of the Assessing Officer in his assessment order and Remand report. At the outset, it is not disputed that the various credits amount lying with the BSE were to the tune of Rs. 1,15,56,860/-. Out of this there was opening balance of Rs. 1,12,60,332/-. The assessing Officer has not disputed the figure of opening balance. He nature of balances representing various transactions in respect of which the BDE had credited to the appellant's A/c have never been commented by the Assessing Officer at both stages of assessment as well as remand proceedings. The ledger A/c of BSE clearing house was very much there in the record. As stated due to the dispute with BSE and due to the action of NSE on SSPL, BSE took strict action to de-activate the accounts of the appellant. The crucial thing is that the appellant is silent to stake it claim from the BSE. The appellant states that he was afraid for his bleak chances of conducting further business with BSE . Further the appellant states in his submission dtd. 23.01.2004 that in order to buy peace, the difference of Rs. 1,15,56,860/- were transferred as bad debt. The perplexity about this claim is that no prudent businessman would transfer quietly such a big amount without

any protest putting up objection blindly to bad debt A/c. I am not convinced with the reply and do not to incline to agree with the appellant. The appellant had strongly argued about its being allowed as loss. I am of the considered view that it is not a fit case for bad debt u/s 36(i)(vii) nor it is a case u/s 28(i)."

8. We have heard the arguments of both the sides and also perused the relevant material on record. The ld. Counsel for the assessee has submitted that this issue relating to assessee's claim for bad debts in relation to his business of share broking now stands squarely covered in favour of the assessee by the decision of Special Bench of the Tribunal in the case of CIT vs. Shreyas S. Morakhia (ITA No. 3374/Mum/04 dtd. 16.7.2010) wherein it has been held that the the amount receivable by the assessee, who is a share broker, from his clients against the transactions of purchase of shares on their behalf constitutes debt which is a trading debt. It has been held that the brokerage/commission income arising from such transactions very much forms part of the said debt and when the amount of such brokerage/commission has been taken into account in computation of income of the assessee of the relevant previous year or any earlier year, it satisfies the condition stipulated in section 36(2)(i) and the assessee is entitled to deduction u/s 36(1)(vii) by way of bad debts after having written off the said debts from his books of account as irrecoverable. The issue relating to the claim of the assessee for bad debts other than the bad debts relating to BSE Clearing House is therefore restored to the file of the A.O. with a direction to allow the claim of the assessee to that extent in the light of the decision of the Special Bench of ITAT in the case of Shereyas S. Morakhia (supra) after

verifying as to whether the brokerage income arising from the relevant sale transactions made by the assessee which resulted in creation of the said debts has been taken into account in computation of the income of the assessee of the relevant previous year or any earlier year. The A.O. is also directed to verify and ascertain the exact quantum of deduction on account of the said bad debts after taking into consideration any security available with the assessee in the form of margin money or the relevant shares purchased by him on behalf of the clients but remained to be transferred in their name.

9. As regards the claim of the assessee for deduction on account of bad debts relating to BSE Clearing House, it appears from the relevant observation recorded by the ld. CIT(A) in para No. 8.3 of his impugned order which is already extracted hereinabove that this amount was not receivable to the assessee on account of transactions of shares made on behalf of the clients as a share broker. In this regard, the ld. Counsel for the assessee has submitted that the said amount actually represented the adjustment made by the BSE Clearing House on account of the amount payable by the assessee for purchase of shares made on behalf of his clients. He has contended that the claim of the assessee for deduction on account of the said amount being trade debts becoming bad thus is also covered by the decision of Special bench of ITAT in the case of Shreyas S. Morakhia (supra). Keeping in view the specific observations recorded by the A.O. as well as the ld. CIT(A) in their respective orders, we are of the view that this contention of the ld. Counsel for the assessee needs verification. We, therefore, restore this issue relating to the assessee's claim for deduction on account

of bad debts in respect of BSE Clearing House to the file of the A.O. with a direction to verify the stand of the assessee that the same also represents his trading debt and decide the same in the light of the decision of the Special Bench of ITAT in the case of Shreyas S. Morakhi (supra).

10. In the result, appeal of the assessee is treated as allowed whereas the appeal of the Revenue is dismissed in terms indicated above.”

2.1. If the observation made in the assessment order, leading to addition made to the total income, conclusion drawn in the impugned order, material available on record, assertions made by the ld. respective counsel, conclusion drawn in the order of the Tribunal dated 06/10/2010, if kept in juxtaposition and analyzed, we note that the Tribunal remanded the issue to the file of the ld. Assessing Officer with certain directions, specifically to verify the stand of the assessee. The appeal of the department, as per the assessee, was dismissed by the Hon'ble High Court, meaning thereby, the order of the Tribunal, as on date, stands. In the order of the Tribunal, the matter was remanded back to the file of the ld. Assessing Officer for A.Y. 2002-03. Thus, the assessee is having a case in his favour. It is also noted that the ld. Commissioner, while granting relief to the assessee place reliance upon the Special Bench decision of the Tribunal in CIT vs Shreyas S. Morakhia (ITA No.3374/Mum/2004) order dated 16/07/2010. During remand proceedings, the stand of the ld. Assessing Officer is that the decision of the Tribunal

was challenged before the Hon'ble High Court. As discussed earlier, the appeal of the Revenue was dismissed by the Hon'ble High Court, therefore, the order of the Tribunal stands. The debt, claimed by the assessee, could not be recovered as the market collapsed and the assessee produce the ledger account of SSPL, where the bad debt of Rs.2,96,80,379/- was written off. The ld. Commissioner in his order dated 30/12/2005 has exhaustively discussed the issue of bad debt by examining each entry and allowed business loss of the impugned amount to the assessee. The assessee has already disclosed the sale of Rs.28,47,86,836/- in the year under consideration in the share trading account. However, without going into much deliberation, and following the decision of the Tribunal dated 06/10/2010 (ITA No.2016/Mum/2006), in the case of assessee itself (A.Y. 2002-03), we direct the Assessing Officer to follow the direction contained in the aforesaid order of the Tribunal and decide in accordance with law. The assessee be given opportunity of being heard, thus, this appeal of the Revenue is allowed for statistical purposes.

Finally, the appeal of the Revenue is allowed for statistical purposes.

This Order was pronounced in the open court in the presence of ld. representatives from both sides at the conclusion of the hearing on 21/10/2015.

Sd/-
(Rajesh Kumar)

लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-
(Joginder Singh)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated :05/11/2015

Shekhar, P.S./नि.स.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai.