

IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH (SMC), KOLKATA

[Before Shri P.M. Jagtap]

I.T.A. No. 174/Kol/2017
Assessment Year 2012-13

Income Tax Officer.....Appellant
36(4), Kolkata
Aayakar Bhawan (Poorva)
8th Floor, Room No. 815,110, Shantipally
Kolkata - 700107

M/s. Ved Sons & Co.....Respondent
15B, Dr. Rajendra Prasad Sarani,
Kolkata - 700001
[PAN: AACFV4091N]

Appearances by:

Shri Arup Chatterjee, Addl. CIT appearing on behalf of the Revenue.
Shri Akkal Dudhuwala, ACA appearing on behalf of the Assessee.

Date of concluding the hearing : September 18, 2017

Date of pronouncing the order : September 27, 2017

ORDER

This appeal is preferred by the revenue against the order of Ld. CIT (A) - 10, Kolkata 16,11.2016.

2. In ground no 1, the revenue has challenged the action of the Ld. CIT (A) in allowing relief to the assessee to the extent of Rs. 48,52,770/- on account of expenses incidental to speculative profit.

3. The assessee in the present case is a partnership firm which is engaged in the business of dealing with gunny bags and clothes as dealer of jute goods besides the purchase and sale of shares as well as investment in shares. The return of income for the year under consideration was filed by it on 29.09.2011 declaring total income at

Rs. NIL. During the course of assessment proceedings, it was noticed by the AO that the income from share transactions was shown by the assessee either as capital gain, speculative profit or dividend income. He also noted that the following expenses incurred by the assessee were incidental to the speculative transactions.

<i>Auction Difference A/c</i>	<i>Rs. 6,012/-</i>
<i>Auction Penalty Charges</i>	<i>Rs. 5,682/-</i>
<i>Broker Note (Stamp)</i>	<i>Rs. 12,132/-</i>
<i>Derivatives (Currency)</i>	<i>Rs. 6,107/-</i>
<i>Derivatives (Shares)</i>	<i>Rs. 47,85,692/-</i>
<i>Service Tax</i>	<i>Rs. 35,822/-</i>
<i>Share difference</i>	<i>Rs. 1,323/-</i>
	<i>Rs. 48,52,770/-</i>

4. According to AO, the above expenses were not allowable as deduction against income from jute business and the same being purely incidental to earning to speculative profit, the assessee was entitled for deduction on account of the said expenses only to the extent of speculative profit of Rs. 83,907/-. He accordingly allowed the said expenses only to the extent of Rs. 83,907/- and disallowed the balance amount in the assessment completed u/s 143(3) vide an order dated 27.03.2014.

5. Against the order passed by u/s 143(3), an appeal was preferred by the assessee before the Ld. CIT (A) and after considering the submission made by the assessee as well as the material available on record, the Ld. CIT (A) deleted the disallowance made by the AO on account of the expenses allegedly incurred by the assessee for speculative transactions for the following reasons given in paragraph no 3 of his impugned order:

"I have carefully weighed the submissions made by the appellant / Ld. AR against the action of Ld. AO. AT the outset it has to be observed that while

recording the preliminary details relating to the business of the assessee-firm, the Ld. AO has himself recorded that the business of the assessee was 'Dealer in jute goods'. From the facts of the case as made out by the appellant, it is observed that the appellant is a dealer in jute products, and beside this activity the appellant also conducts transactions involving purchase and sale of shares and derivatives and is also an investor in shares. It has been explained by the appellant that in the subject assessment year the firm had conducted intra-day trades in shares in which it derived profit of Rs. 83,907/-. The appellant has also conducted trades in derivatives in which it incurred a loss of Rs. 47,91,799/-. The shares held by way of investments yielded dividend income of Rs. 7,22,668/- and capital gain of Rs. 1,48,21,267/-, both long term as well as short term. It was explained that the profit derived from intra-day trades were in the nature of speculation transaction in terms of section 43(5)(a) of the Act and therefore it was offered to tax by way of speculation profit. However the loss incurred in derivatives fell squarely within the exception provided in clause (d) of section 43(5) and therefore it was offered as regular business loss. The dividend income from investment in shares was treated as exempt u/s 10(34) and the capital gain was offered to tax as per the provisions of law. The Ld. AO has tabulated certain figures to be expenses, whereas it has been explained that the conclusion of the Ld. AO that 'expenses' of Rs. 48,52,770/- was incurred in relation to earning 'speculation profit' is ex-facie incorrect, as in the said table the 'expenses' amounted only to Rs. 60,971/- and the balance sum represented 'losses' incurred in trading of derivatives amounting to Rs. 47,91,799/-. In the situation, I am in agreement with the explanation offered by the appellant that the figure of Rs. 47,91,799/- represents 'loss' and not 'expense'. It has been explained that this figure of loss was incurred in the business of trading in derivatives and that therefore it had no connection whatsoever with the intra-day share trading in cash segment. As such the loss appears to have been incurred in the business of trading of shares, and it is apparent that it is not an outflow of expenditure to be treated as an expense. As it is not an expense, I find myself in agreement with the contentions of the appellant that the same could not have been disallowed, as has been done by the Ld. AO. The loss claimed by the appellant is the final result of an activity carried out by the assessee. It has also been explained by the appellant that the impugned loss was incurred in the business of trading in derivatives and not intra-day share trading, and that in terms of the exception provided in section 43(5), the loss incurred by an assessee in the business of trading in eligible derivatives on a recognized stock exchange is deemed to be regular/normal business loss and cannot be treated as speculative

transactions. In the circumstances what emerges is that the losses were normal business losses and not on account of any speculative transactions as has been concluded by the Ld. AO. As regards certain other expenses in the table of disallowances, it has been explained that the auction difference and penalty charges of Rs. 6,012/- & 5,682/- respectively have already been disallowed and added back by the appellant in the computation of income for the relevant AY 2011-12 and therefore the disallowance made by the AO amounts to double addition of the very same sum. I am in agreement with such contentions as the same is apparent from the computation of income filed by the assessee. With regard to expenses incurred on stamp charges & service tax amounting to Rs 12,132/- and Rs. 35,822/- respectively, it has been explained by the appellant that these expenses were wholly and exclusively related to the transactions conducted in derivatives, and had no relation whatsoever with the intra-day trades which yielded speculative profit of Rs. 83,907/-. On the basis of the factual matrix, I find myself in agreement with the appellant, and find that the Ld. AO was unjustified on both counts of treatment of losses, as well as disallowances of what he interpreted to be incidental expenses related to the speculation business”

6. I have heard the arguments of both the sides and also perused the relevant material available on record. It is observed that the expenses disallowed by the AO as incidental to speculative profit were mainly comprising of a loss of Rs. 47,85,692/- incurred by the assessee in derivative transactions and as held by the Ld. CIT (A), the same was liable to be treated as regular/normal loss in terms of the exception provided in section 43(5) having been incurred by the assessee in the business of trading in eligible derivative on recognised stock exchange. AT the time of hearing before us, the learned DR has not been able to raise any material contention to show that this basis adopted by the Ld. CIT (A) is not tenable in law or in the facts of the assessee's case. The only contention raised by him is that an altogether different basis has been adopted by the Ld. CIT (A) to give relief to the assessee on this issue. However, keeping in view that the

loss in derivative transactions of RS. 47,85,697/- was wrongly treated by the AO as the expenditure incurred by the assessee while making a disallowance on this issue and the Ld. CIT (A) having been understood and appreciated the exact nature of the said loss and having allowed relief to the assessee on the basis of exception provided in section 43(5), I find no infirmity in the impugned order of the Ld. CIT (A) giving relief to the assessee on this issue and upholding the same, I dismiss ground no 1 of the revenue's appeal.

7. Ground no 2 raised by the revenue relates to the deletion by the Ld. CIT (A) of the disallowance of Rs. 1,20,000/- made by the AO out of sale promotion expenses.

8. In the profit and loss account filed along with its return of income, a sum of Rs. 2,05,513/- was debited by the assessee on account of sales promotion expenses. Keeping in view the nature of the assessee's business as well as its failure to furnish the relevant bills and vouchers to support and substantiate the claim for sales promotion expenses, a disallowance of Rs. 1,20,000/- was made by the AO on estimated basis. On appeal, the Ld. CIT (A) deleted the said disallowance made by the AO for the following reasons given in his impugned order:

"Having carefully analyzed the submissions of the ld. ARs in the light of the action of the Ld. AO, I find that the Ld. AO has disallowed Rs. 1,20,000/- out of a claim of Rs. 2,05,513/-. It has been recorded by the Ld. AO that the ledger of such expenses on account of 'sales promotion' was produced by the assessee during the scrutiny proceedings. When the situation was such, the Ld. AO has not pointed out as to which were the expenditure listed in the ledger not to his satisfaction. I find that it is highly presumptive on the part of the Ld. AO to say that there would be not much sales promotion expenditure in the case of the assessee, as the

firm was a dealer in shares. I find this to be a contradiction of facts, as the Ld. AO has himself recorded in the preliminary details of the assessment order that the assessee-firm was a 'dealer in jute goods'. On the other hand I find adequate strength in the contention of the appellant that for the case at hand, the business promotion expenses as a percentage of sales was 0.32% and that the same cannot be held to be either excessive or unreasonable. I have considered the explanation rendered by the appellant that the firm is engaged in the business of dealing in jute goods, and that considering the nature of the business of the appellant, it is required to hold meetings / negotiations with jute mill owners and their managers to conduct negotiations. It has also been explained that the supervisor and the different office staff are also required to incur expenses towards entertaining the customers who visit the office, and that these types of business promotion expenses are customary and typical to the appellant's business. It was also explained that such expenditure is primarily vouched in cash and the vouchers are mostly maintained at the respective sites. It is seen that the Ld. AO has disallowed Rs. 1,20,000/- on an ad hoc basis admittedly on his opinion. The judicial precedents submitted by the appellant / Ld. AR suggest that Courts do not approve of ad hoc disallowances made in an arbitrary fashion, without specifically pointing out inadequacies / deficiencies in the books or vouchers, especially when the accounts have been subjected to mandatory audit. Hon'ble courts have frowned upon any disallowances being made in an ad hoc fashion without examining ledgers and expense related vouchers."

9. I have heard the arguments of both the sides on this issue and also perused the relevant material available on record. The learned DR has contended that the disallowance out of sales promotion expenses was made by the AO inter alia for the failure of the assessee to produce the relevant supporting evidence in the form of bills, vouchers etc. and this vital aspect has been completely overlooked by the Ld. CIT (A) while deleting the entire disallowance made by the AO out of sales promotion and expenses. The learned counsel for the assessee, on the other, hand has contended that the total business promotion expenses claimed by the assessee during the year under consideration were only to the extent of 0.32% of the total sales and

therefore the disallowance, if any, for the failure of the assessee to produce the relevant supporting evidence cannot be as high as Rs. 1,20,000/- made by the AO which is more than 60% of the total expenses claimed by the assessee. After considering the submissions made by the learned representative of both the sides and having regard to all the facts of the case including the nature of the assessee's business, I am of the view that it would be fair and reasonable to disallow 15% of the total sales promotion expenses claimed by the assessee for its failure to support and substantiate the same by producing the relevant documentary evidence in the form of bills, vouchers etc. The impugned order of the Ld. CIT (A) on this issue is accordingly modified and the disallowance made by the AO out of sales promotion expenses is restricted to 15% of the total claim made by the assessee. Ground No. 2 of the revenue's appeal is thus partly allowed.

10. Ground No. 3 relates to the deletion by the Ld. CIT (A) of the disallowance of Rs. 1,80,000/- made by the on account of payment made by the assessee to Shri Krishna Kr. Ashar on account of supervision charges.

11. According to the AO, the assessee was required to deduct tax at source from the impugned payment u/s 194C of the Act and since there was failure on the part of the assessee to do so, he made a disallowance on account of supervision charges of Rs. 1,80,000/- paid by the assessee by invoking the provisions of section 40(a)(ia). On appeal, the Ld. CIT (A) deleted the said disallowance for the following reasons given in his impugned order:

“Having examined the action of the Ld. AO as well as the submissions of the appellant, I find that there is no reason to disbelieve the contentions of the appellant that even though the payments were made under the head of ‘Supervision Charges’, they were in a structured periodical monthly basis of Rs. 15,000/- each, and that there was an Employer-employee relationship with the person being paid. In the said situation, I find merit in the contention of the appellant that as the salary paid to the said person Shri Krishna Ashar did not exceed the maximum taxable limit, no tax was deducted thereon u/s 192 of the Act. It has been pleaded on facts that Shri Ashar was working in the capacity as a Supervisor of business, being an experienced person, and that the accountant had quite inadvertently debited his salary under a separate head ‘supervision charges’ instead of salary. It has also been pleaded that the facts would be evident from his appointment letter dated 08.05.2007, and that therefore taxes on these payments, if any, were to be deducted under section 192 of the I.T. Act and not section 194C as alleged by the Assessing Officer. I find strength in such arguments of the appellant and therefore when seen in the factual matrix, find that the action of the AO would be unsustainable, and unduly harsh in the circumstances. The addition / disallowance made by the Ld AO is accordingly directed to be deleted. Ground no 5 is accordingly allowed in favour of the appellant – assessee.”

12. I have heard the arguments of both the sides on this issue and also perused the relevant material available on record. It is observed that the disallowance of Rs. 1,80,000/- made by the AO u/s 40(a)(ia), on account of supervision charges, was deleted by the Ld. CIT (A) after having found that the amount paid by the assessee to Shri Krishna Kr. Ashar was actually in the nature of salary and since the same did not exceed the maximum taxable limit, no tax was deducted by the assessee at source u/s 192 of the Act. At the time of hearing before us, the learned DR has not been able to bring anything on record to rebut or controvert the finding of fact given by the Ld. CIT (A) as regards the nature of amount in question while giving relief to the assessee on this issue. I, therefore, find no justifiable reason to interfere with the impugned order of the Ld. CIT (A) giving relief to

the assessee on this issue and upholding the same, I dismiss ground no 3 of the revenue's appeal.

12. In the result, the appeal of the revenue is partly allowed.

Order Pronounced in the Open Court on 27th September, 2017.

Sd/-
(P.M. Jagtap)
ACCOUNTANT MEMBER

Dated: 27/09/2017

Biswajit, Sr. P.S.

Copy of order forwarded to:

1. M/s. Ved Sons & Co., 15B, Dr. Rajendra Prasad Sarani, Kolkata – 700001.
2. ITO, Ward 36(4), Kolkata.
3. The CIT(A)
4. The CIT
5. DR

True Copy,

By order,

Sr. P.S. / H.O.O.
ITAT, Kolkata