

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E" MUMBAI**

**BEFORE SHRI D.T. GARASIA (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 4208/MUM/2014
Assessment Year: 2009-10**

Shharad Singhanian HUF 2/3, Bhagwan Apartment 12, Worli Sea Face, Mumbai-400018 PAN No. AAKHS0542R	Vs.	CIT-18 Room No. 517, Piramal Chambers, Lalbaug Mumbai-400012.
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Appellant

Respondent

Assessee by : None
Revenue by : Shri Manjunatha Swamy, DR

Date of Hearing : 10/10/2017
Date of pronouncement : 30/10/2017

ORDER

PER N.K. PRADHAN, A.M.

This is an appeal filed by the assessee. The relevant assessment year is 2009-10. The appeal is directed against the order u/s 263 of the Income Tax Act 1961, (the 'Act') dated 14.03.2014 passed by the Commissioner of Income Tax (CIT)-18, Mumbai.

2. We find that the case was fixed for hearing before the Tribunal on 25.01.2017, 20.06.2017 and 10.10.2017. Neither the assessee nor his

authorized representative appeared before the Tribunal on the above dates.

As such, we are proceeding to dispose off this appeal after hearing the Ld. DR and the materials available on record.

3. The assessee filed its return of income for the AY 2009-10 on 23.09.2009 declaring total income at Rs. Nil. The Assessing Officer (AO) completed the assessment u/s 143(3) on 23.12.2011 assessing the total income at Rs. Nil.

4. The CIT has passed the 263 order on two grounds. The first is the supposed disallowance of proportionate interest of Rs.4,89,776/-. The reasons given by the CIT are as under:

“On perusal of the records, it was seen that the assessee had advanced loan of Rs.1,13,72,055/- during the F.Y.2008-09, on which no interest was charged. On the other hand, the assessee had paid interest of Rs.8,45,435/- on unsecured loan of Rs.1,96,30,075/- and the same was debited to the P&L A/c. This interest amount was adjusted against “Income from Other Sources”. The assessee utilized his interest bearing funds for non- business purpose and interest expenditure incurred was claimed as expenses from "Income from Other Sources". Further, it was observed that the assessee's opening capital balance as on 1.4.2008 was Rs.32,50,006/- and closing capital balance as on 31.03.2009 was Rs.14,68,746/- which showed that the assessee did not have sufficient capital balance to give huge interest free loans and advances. This issue was not examined by the A.O. during the course of assessment proceedings. The AO should have disallowed the proportionate interest to the tune of Rs.4,89,776/- [$8,45,435 \times 1,13,72,055 / 1,96,30,075 = \text{Rs.}4,89,776$] and added to the total income of on a/c of interest bearing funds utilized

against interest free funds. Failure on the part of the AO to make addition of Rs.4,89,776/- on account of proportionate interest paid on unsecured loan resulted in an erroneous assessment order which is also prejudicial to the interest of revenue.”

4.1 The second ground on which the CIT has passed the order u/s 263 is against the order passed by the AO allowing speculation loss to be set off against ‘Income from House Property’ and ‘Income from Other Sources’. The reasons given by the CIT are as under:

“On perusal of the capital account as on 31.03.2009, it was seen that the assessee had shown commodity loss of Rs.47,08,806/-. This commodity loss of Rs.47,08,806/- was set off by the assessee against “Income from House Property” at Rs.26,65,824/- and “Income from Other Sources” at Rs.2,10,794/- totalling to Rs.28,76,618/- and loss of Rs.18,51,490/- was carried forward. On further perusal of the case records, it was seen that the commodity loss of Rs.47,08,806 was shown to be from trading in commodity at MCX Stock Exchange Limited. According to Section 43(5)(d)(ii) of the Income Tax Act, speculative transaction means a transaction in which a contract for the purchase or sale of any commodity including stocks and shares is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips, provided that for the purpose of this clause an eligible transaction carried out in a Recognized Stock Exchange shall not be deemed to be a speculative transaction. According to Notification No. 46 / 2009 dated 22.05.2009, the Central Government notified MCX Stock Exchange as recognized Stock Exchange w.e.f. 22.05.2009. Thus, the transactions carried out by the assessee at MCX Stock Exchange Limited during the F.Y. 2008-09 were speculative transactions as the said Exchange was not a recognized Stock Exchange during that period. In view of the aforesaid Notification it is clear that MCX Stock Exchange Ltd. is recognized

w.e.f. 22.05.2009 and considering this date, whatever transactions were carried out by the assessee in the F.Y. 2008-09 are treated as speculation transaction. The commodity loss incurred by the assessee amounting to Rs.47,08,806/- should have been assessed under the head of 'Speculation Loss' in view of Section 43(5)(d)(ii) of the Income Tax Act and the aforesaid Notification. This 'Speculation Loss' of Rs.47,08,806/- cannot be adjusted against 'Income from House Property' and 'Income from Other Sources' in view of provisions of section 73 of the Income Tax Act. However, the A.O. allowed this speculation loss to be set off against 'Income from House Property' and 'Income from Other Sources' resulting in an erroneous Assessment Order which is also prejudicial to the interest of revenue.”

5. We find that in the instant case, the AO has made the assessment without proper enquiry. In the case of *Rampyari Devi Saraogi vs. CIT* 67 ITR 84 (SC), it has been held that unlike Civil Court which is neutral to give a decision on the basis of evidence produced before it, an Assessing Officer is not only an adjudicator but is also an investigator. He cannot remain passive on the face of a return which is apparently in order but calls for further enquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke enquiry. If there is failure to make such enquiry, the order is erroneous and prejudicial to the interest of the revenue. The CIT need not prove that it is erroneous and he can revise it u/s 263.

6. In view of the above facts, the order of the AO being erroneous and prejudicial to the interest of the revenue, the CIT has rightly passed the order u/s 263. We uphold the same.

7. In the result, the appeal is dismissed.

Order pronounced in the open Court on 30/10/2017.

Sd/-
(D.T. GARASIA)
JUDICIAL MEMBER

Mumbai;

Dated: 30/10/2017

Rahul Sharma, Sr. P.S.

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

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