आयकर अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर

IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI MANISH BORAD, ACCOUNTANT MEMBER

ITA No.954/Ind/2016
Assessment Year: 2013-14

Pumarth Properties & Holding(P) Ltd., 5/5A Navratan Bagh Behind Vishesh Hospital, Indore	**बनाम**/ Vs.	DCIT, Central-1, Indore
(Revenue)		(Respondent)
P.A. No.AACCP0838Q		

Appellant by	Shri Sumit Nema Sr. Adv. & Gagan Tiwari Adv.,
Respondent by	Shri Lal Chand, CIT- DR
Date of Hearing:	**16.01.2018**
Date of Pronouncement:	**31 .01.2018**

आदेश / O R D E R

PER KUL BHARAT, J.M:

This appeal by the Assessee is directed against the order of Ld. Commissioner of Income Tax(Appeals)-III, Indore, (in short 'CIT(A)'), dated 18.07.2016 pertaining to A.Y. 2013-14. The assessee has raised following grounds of appeal:

"1.That the Ld. CIT has erred in not allowing the set off of business against the additional income offered of

Rs.1,80,00,000/- without appreciating the facts and circumstances of the case.
2. That the Ld. CIT has erred in invoking provisions of section 115BBE on the additional income offered amounting to Rs.1,80,00,000/- without considering the facts and circumstances of the case.
3. That the order so passed is bad in law & wrong."

2. Briefly stated facts are that search and seizure operation u/s 132 has carried out on the business as well as residential premises of the Apollo Group of Indore including the assessee. During the course of assessment proceedings the assessee had offered an additional income of Rs.1,80,00,000/- but also claimed set off of business loss against this income. The Assessing Officer did not allow set off of loss by relying provisions of section 115BBE of the Act.

3. Aggrieved by this the assessee preferred an appeal before the Ld. CIT(A) who after considering the submissions affirm the view of the AO. Now the assessee is in further appeal.

4. The only effective ground in this appeal is declining the claim of set off against the additional income offered by the assessee. The Ld. counsel for the assessee submitted that the authorities below wrongly construed the provisions of law. He submitted that the provisions so applied were not in existence. He further submitted that the amendment in section 115BBE of the Act would be applicable from A.Y. 2017-18. The Ld. counsel submitted that the income offered cannot be termed as income covered u/s 68, 69, 69A, 69B & 69C of the Act. He further placed reliance on the

decision of the Hon'ble Supreme Court rendered in the case of CIT, Mumbai vs. M/s. Walfort Share & Stock Brokers P. Ltd. in Civil Appeal No.4927 of 2010. The Ld. counsel also drew our attention to the explanatory notes to the provisions of Finance Act, 2016. He drew our attention to para 46.1 to 46.3 of the explanatory notes to the provision of Finance Act, 2016. For the sake of clarity same is reproduced herein below:

> *"46.1 Section 115BBE of the Income Tax Act inter alia provides that the income relating to section 68 or section 69 or section 69A or section 69C or section 69D is taxable at the rate of thirty per cent and further provides that no deduction in respect of any expenditure or allowances in relation to income referred to in the said sections shall be allowable.*
> *46.2 Currently, there is uncertainty on the issue of set-off of losses against income referred to in section 115BBE of the Income Tax Act. The matter has been carried to judicial forums and courts in some cases has taken a view that losses shall not be allowed to be set off against income referred to in section 115BBE. However, the current language of section 115BBE of the Income Tax Act does not convey the desired intention and as a result the matter is litigated. In order to avoid unnecessary litigation, the provision of the sub-section (2) of section 115BBE of the Income Tax Act has been amended as to expressly provide that no set off of any loss shall be allowable in respect of income under the sections 68 or section 69 or section 69A or section 69B or section 69C or section 69D.*
> *46.3 Applicability: This amendment takes effect from 1st of April, 2017 and will, accordingly, apply from assessment year 2017-18 and subsequent assessment years.*

He drew our attention to clause 46.3 which is related to applicability of the amendment. On the contrary Ld. DR vehemently opposed the submissions and supported the orders of the

authorities below, he also filed a short synopsis. The contents of the same are reproduced as under:

> *"It is a settled rule of construction that every statue is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation. Ordinarily the court are required to gather the intention of the legislature from the overt language of the provision as to whether it has been made prospective or retrospective, and if retrospective, then from which date. However, some times what happens is that the substantive provision, as originally enacted or later amended, fails to clarify the intention of the legislature. In such a situation if subsequently some amendment is carried out to clarify the real intent, such amendment has to be considered as retrospective from the date when the earlier provisions was made effective. Such clarificatory or explanatory amendment is declaratory. As the later amendment clarifies the real intent and declares the position as was originally intended, it takes retroactive effect from the date when the original provision was made effective. Normally such clarificatory amendment is made retrospectively effective from the earlier date. It may also happen that the clarificatory or explanatory provision introduced later to depict the real intention of the legislature is not specifically made retrospective by the statute. Notwithstanding the fact that such amendment to the substantive provision has been given prospective effect, the judicial or quasi-judicial authorities, on a challenged made to it, can justifiably hold such amendment to be retrospective. The justification behind giving retrospective effect to such amendment is to apply the real intention of the legislature from the date such provision was initially introduced. The intention of the legislature while introducing the provision is gathered, inter alia, from the finance bill, Memorandum explaining the provisions of the Finance bill etc. Reliance is placed on the decision of "B" bench of Hon'ble I.T.A.T. Kolkata in the case of Shubhlakshmi Vinija Pvt. Ltd. 60 taxmann.com 60 wherein Hon'ble I.T.A.T, while examining the retrospective applicability of proviso to section 68 of the IT Act 1961 has beautifully analyzed the issue of applicability of amendments and laid*

down the above principles while examining the issue. Therefore, it is imperative to examine the applicability of amendment in section 115BBE(2) w.e.f. 04.01.2017 in the light of principles laid down in the decision as discussed supra."

5. The Ld. DR placed reliance on the decision of coordinate bench, Kolkata in the case of Subhalakshmi Vanijya (P.) Ltd. vs. CIT.

6. We have heard the rival contentions and perused material available on the record. The Ld. CIT(A) has decided this issue by observing as under:

"3.3 I have gone through the assessment order and the appellant's contentions. The Finance Act, 2012 introduced a new section 115BBE which states that where any income of the nature referred to in section 68,69,69A,69B,69C or 69D forms part of the total income, then such income shall be chargeable to tax at the flat rate of 30%. The cash credits, unexplained investments, either in part or in full, income from undisclosed source and unexplained expenditures are not chargeable to tax at the flat rate of 30%, similar to income from lottery, crossword puzzle, gambling, betting, etc.

3.4 The appellant has submitted that the amendment in section 114BBE(2) by insertion of words 'set off of any loss' is not retrospective in nature and will be applicable w.e.f. 01.04.2017. The appellant has also relied on the Memorandum explaining the budget provisions considered to be part of Finance Bill, 2016 where in it is stated that the current language of section 115BBE of the Act does not convey the desired intention and as a result the matter is litigated. In order to avoid unnecessary litigation, it is proposed to amend the provision of sub-section (2) of section 115BBE to expressly provide that no set off of any loss shall be allowed in respect of income under the section 68 or section 69A or section 69B or section 69C or section 69D. The appellant has submitted that since the insertion of words in section 115BBE(2) 'set off of any loss' is not retrospective in

nature and will be applicable w.e.f. 01.04.2017 and the appellant's matter pertains to A.Y. 2013-14, the appellant is squarely out of the purview of section 115BBE(2).

3.5 The reason for introducing section 115BBE is explained in the Explanatory Memorandum of the Act which runs as under with the caption Measures to prevent generation and circulation of unaccounted money:

"Under the existing provision of the Income-tax Act, certain unexplained amounts are deemed as income under section 68, section 69, section 69A, section 69B, section 69C and section 69D of the Act and are subject to tax as per the tax rate applicable to the assessee. In case of individuals, HUF, etc. no tax is levied up to the basis exemption limit. Therefore, in these cases, no tax can be levied on these deemed incomes if the amount of such deemed income is less than the amount of basic exemption limit and even if it is higher, it is levied at the lower slab rate.

In order to curb the practice of laundering of unaccounted money by taking advantage of basic exemption limit, it is proposed to tax the unexplained credits, money, investment, expenditure etc. which have been deemed as incomes under section 68, section 69, section 69A, section 69B, section 69C or section 69D, at the rate of 30% is clear. The amendment in section 115BBE(2) w.e.f. 01.04.2017 is only clarificatory and to avoid litigation. The income surrendered by the appellant during the course of the search has the character of items included in section 115BBE and therefore will be chargeable at the flat rate of tax at 30%.

3.6 In view of the above, the additional income of Rs.1,80,00,000/- admitted during the search and offered by the appellant in its return of income is taxable @ 30% and no set off of business loss is to be allowed against the said income. Ground Nos. 1 and 2 are therefore dismissed."

7. From the above it is clear that the Ld. CIT(A) has applied the memorandum of explanation and treated the amendment of retrospective nature, treating the same as clarificatory in nature.

We are unable to affirm this view of the authorities below. In view of the judgment of the Hon'ble Supreme Court rendered in the case of CIT, Mumbai vs. M/s. Walfort Share & Stock Brokers P. Ltd.(supra). The Hon'ble Apex Court while examining the amendment made in section 94 of the Act, after considering the law in detail held as under:

> "*In the lead case, we are concerned with the assessment years prior to insertion of Section 94(7)vide Finance Act, 2001 w.e.f. 1.4.2002. We are of the view that the AO had erred in disallowing the loss. In the case of* ***Vijaya Bank*** *v.* ***Additional Commissioner of Income Tax*** *[1991] 187 ITR 541, it was held by this Court that where the assessee buys securities at a price determined with reference to their actual value as well as interest accrued thereon till the date of purchase the entire price paid would be in the nature of capital outlay and no part of it can be set off as expenditure against income accruing on those securities. The real objection of the Department appears to be that the assessee is getting tax-free dividend; that at the same time it is claiming loss on the sale of the units; that the assessee had purposely and in a planned manner entered into a pre-meditated transaction of buying and selling units yielding exempted dividends with full knowledge about the fall in the NAV after the record date and the payment of tax-free dividend and, therefore, loss on sale was not genuine. We find no merit in the above argument of the Department. At the outset, we may state that we have two sets of cases before us. The lead matter covers assessment years before insertion of Section 94(7) vide Finance Act, 2001 w.e.f. 1.4.2002. With regard to such cases we may state that on facts it is established that there was a "sale".The sale-price was received by the assessee. That, theassessee did receive dividend. The fact that the dividend received was tax-free is the position recognized under Section 10(33) of the Act. The assessee had made use of the said provision of the Act. That such use cannot be called "abuse of law". Even assuming that the transaction was pre-planned there is nothing to impeach the genuineness of the transaction.*

*With regard to the ruling in **McDowell & Co. Ltd.** v. **Commercial Tax Officer** [154 ITR 148(SC)], it may be stated that in the later decision of this Court in **Union of India** v. **Azadi Bachao Andolan** [263 ITR 706(SC)] it has been held that a citizen is free to carry on its business within the four corners of the law. That, mere tax planning, without any motive to evade taxes through colourable devices is not frowned upon even by the judgment of this Court in **McDowell & Co. Ltd.'s case (supra)**. Hence, in the cases arising before 1.4.2002,losses pertaining to exempted income cannot be disallowed. However, after 1.4.2002, such losses to the extent of dividend received by the assessee could be ignored by the AO in view of Section 94(7). The object of Section 94(7) is to curb the short term losses.Applying Section 94(7) in a case for the assessment year(s) falling after 1.4.2002, the loss to be ignored would be only to the extent of the dividend received and not the entire loss. In other words, losses over and above the amount of the dividend received would still be allowed from which it follows that the Parliament has not treated the dividend stripping transaction as sham or bogus. It has not treated the entire loss as fictitious or only a fiscal loss. After 1.4.2002,losses over and above the dividend received will not be ignored under Section 94(7). If the argument of the Department is to be accepted, it would mean that before 1.4.2002 the entire loss would be disallowed as not genuine but, after 1.4.2002, a part of it would be allowable under Section 94(7) which cannot be the object of Section 94(7) which is inserted to curb tax avoidance by certain types of transactions in securities. There is one more way of answering this point. Sections 14A and 94(7) were simultaneously inserted by the same Finance Act, 2001. As stated above, Section 14A was inserted w.e.f. 1.4.1962 whereas Section 94(7) was inserted w.e.f. 1.4.2002. The reason is obvious. Parliament realized that several public sector undertakings and public sector enterprises had invested huge amounts over last couple of years in the impugned dividend stripping transactions so also declaration of dividends by mutual fund are being vetted and regulated by SEBI for last couple of years. If Section 94(7) would have been brought into effect from 1.4.1962, as in the*

case of Section 14A, it would have resulted in reversal of large number of transactions. This could be one reason why the Parliament intended to give effect to Section 94(7) only w.e.f. 1.4.2002. It is important to clarify that this last reasoning has nothing to do with the interpretations given by us to Sections 14A and 94(7). However, it is the duty of the court to examine the circumstances and reasons why Section 14A inserted by Finance Act 2001 stood inserted w.e.f. 1.4.1962 while Section 94(7) inserted by the same Finance Act as brought into force w.e.f. 1.4.2002."

Further in view of the fact that in the explanatory notes itself states that this amendment takes effect from 1st April 2017 and would accordingly be applicable from assessment year 2017-18 and subsequent assessment years. The year under appeal is 2013-14, therefore, in our considered view the authorities below have wrongly disallowed the set off of loss and taxed the same @ 30%. We, therefore, reverse the finding of Ld. CIT(A) and direct the Assessing officer to allow the set off of loss as claimed by the assessee.

8**.** In the result, the appeal of the Assessee is allowed.

Order was pronounced in the open court on 31 .01.2018.

Sd/-	Sd/-
(MANISH BORAD)	(KUL BHARAT)
CCOUNTANT MEMBER	JUDICIALMEMBER

Indore; दिनांक Dated : 31 / 01/2018

Patel. P.S./नि.स.

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order

Private Secretary/DDO, Indore