

आयकर अपीलिय अधिकरण, मुंबई “एल” खंडपीठ

Income-tax Appellate Tribunal -“L”Bench Mumbai

सर्वश्री राजेन्द्र,लेखा सदस्य एवं, राम लाल नेगी, न्यायिक सदस्य

Before S/Shri Rajendra,Accountant Member and Ram Lal Negi,Judicial Member

आयकर अपील सं./I.T.A./9164/Mum/2010,निर्धारण वर्ष /Assessment Year: 2006-07

आयकर अपील सं./I.T.A./6381/Mum/2011,निर्धारण वर्ष /Assessment Year: 2007-08

आयकर अपील सं./I.T.A./7098/Mum/2011,निर्धारण वर्ष /Assessment Year: 2008-09

Afcons Infrastructure Limited Afcons House, 16, Shah Industrial Estate Veera Desai Road, Azad Nagar P.O. Andheri (W), Mumbai-400 053. PAN:AAACA9067 G	Vs.	DCIT – Range 8(1) Aayakar Bhavan, M.K. Road Mumbai-400 020.
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A./751/Mum/2011,निर्धारण वर्ष /Assessment Year: 2006-07

आयकर अपील सं./I.T.A./6697/Mum/2011,निर्धारण वर्ष /Assessment Year: 2007-08

आयकर अपील सं./I.T.A./8127/Mum/2011,निर्धारण वर्ष /Assessment Year: 2008-09

DCIT – Range 8(1) Aayakar Bhavan, M.K. Road Mumbai-400 020	Vs.	Afcons Infrastructure Limited Andheri (W), Mumbai-400 053. PAN:AAACA9067 G
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

Revenue by: Shri Samuel Darse-CIT-DR

Assessee by: Shri J.D. Mistry and Shri Nitesh Joshi

सुनवाई की तारीख / Date of Hearing: 01.03.2018

घोषणा की तारीख / Date of Pronouncement: 02.05.2018

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य, राजेन्द्र के अनुसार -PER RAJENDRA, AM-

Challenging the orders, of the CIT(A)-16, Mumbai the assessee and the Assessing Officer (AO) have filed cross-appeals for the above mentioned assessment years(A.Y.s)..Assessee-company is engaged in the business of civil constructions viz. roads, foundations and marine works, bridges etc. As most of the issues in all the appeals are common,so,we are adjudicating the above appeals together.Details of filing of returns of income returned incomes, assessed incomes, etc., can be summarised as under :-

A.Y.	ROI filed on	Returned Income	Assessment dt.	Assessed Income	CIT(A)order dt.
2006-07	27/11/2006	NIL	29/12/2008	NIL	19/11/2010
2007-08	25/10/2007	NIL	29/12/2009	Loss Rs.788.3	04/07/2011
2008-09	27/09/2010	NIL	09/04/2010	Rs.13.63 crores	02/09/2011

2.During the course of hearing before us,the Authorised Representative(AR)and the Department -al Representative(DR)agreed that following issue stand covered by the orders of the Tribunal

for the AY.2001-02(ITA/3949/Mum/2005/ITA/4269/Mum/2005,AY.2001-02,dtd.08/07/2016)or for the AY.s2002-03 to AY.2006-06(ITA.s/3605 & 6931/Mum/2006,ITA./5177/Mum/2009 and ITA/9163/Mum/2010,Dated 29.09.2017).We are tabulating the issues and the grounds covered by the above mentioned two orders.

Issue & GOA	Decided by ITA,AY.	Pg. & Para	Decision
Interest on incremental loans given to subsidiaries/ Sister concerns after 31.05.1996.(Gs.AO 1 and 2 for the all the three AY.s.).	ITA.s AY. 2001-02	Pg.5-15, Para 5-13	Favouring Assessee
Disallowance u/s. 14 A of the Act (Gs.AO 3-6, 3-5 and 3-5 for the AY. 06-07,07-08 and 08-09 respective -ly)	ITA.s AY. 2001-02	Pg.15-19 Para 14-20	Favouring Assessee

2.1.Now,we will be tabulating the Gs.AO decided,in the appeals filed by the AO,for the earlier AY.s.

Issue & GOA	Decided by ITA,AY.	Pg. & Para	Decision
Interest on loans given to subsidiaries/sister concerns (GOA 1 for all the three AY.s.)	ITA.s AY.2001-02	Pg.5-15/28 Para 5-13/37	Against AO
Depreciation on plant and machinery-Speed Boat (GOA 2 for all the three AY.s.)	-as above -	Pg.37-39 Para 53	Against AO
Professional fees paid for arbitration awards (GOA 3 for the AY.s. 2006-07 and 07-08)	ITA.s AY.2005-06,	Pg.69-71 Para 76-77	Against AO
14A disallowance (GOA 4 for the AY. 2007-08)	ITA.s AY.2001-02 & ITA.s AY.2005-06	15-19/ 28-29 Para14-20/ 8-39	Against AO

2.2.Considering the above,we decide both the issues(i.e.Interest on incremental loans given to subsidiaries/sister concerns after 31.05.1996 and Disallowance made u/s.14A of the Act),raised by the assessee,in its favour,for the all the three AY.s.

2.3.Similarly,all the four issues raised by the AO(Interest on loans given to subsidiaries/sister concerns,Depreciation on plant and machinery,Professional fees paid for arbitration awards) and 14A disallowance are decided against the AO.

3.Now,we would take up the independent issue that are not covered by the order of the Tribunal for the earlier years.First such ground (Gs.OA 7-9 for AY.2006-07 and GOA 6 for remaining both the AY.s) is about advances written off during the AY. s. 2006-07,2007-08 and 2008-09.

3.1.During the assessment proceedings for the AY.2006-07,the AO found that the assessee had written off Rs. 165.053 lakhs on account of bad debts.He called for the details in that regard. After considering the same,he held the assessee had written of advances to the tune of Rs.61.53 lakhs,that the same could not be treated bad debts,that advances written off were not allowable as per the provisions of section 36(1)of the Act.

3.2.In the appellate proceedings,before the First Appellate Authority(FAA),the assessee made detailed submissions and relied upon certain cases laws.After considering the order of the AO and the submissions of the assessee, he held that all expenses/losses incidental to business were allowable as per the commercial accounting and sickles, that if specific prohibitions were there than expenses could not be allowed as deductions,that the assessee had claimed the advances written off u/s. 36 of the Act, that he had claimed writing off of bad debts on the same section, that AO had allowed the bad debts, that the AO had rightly held that advances written of could not be allowed u/s. 36 of the Act. He referred to the cases of Basumal Jagat Narayan(38 ITR 447),United Breweries Ltd(321 ITR 446),Greaves Ltd.(251 ITR 190),Wheel and Rim India Ltd (275 ITR 648) and held that losses incidental to business were allowable as deduction despite their being no specific provision for the same, that if there was a direct and proximate nexus between the business operation and the loss,the loss had to be allowed,that the case of the assessee fell under the head business loss and not under the head bad debts,that the parameters for treating business loss and bad debts were different,that in order to claim business loss the assessee had to produce sufficient evidence as to how and what circumstances it had incurred losses,that it had not produced sufficient evidence before the AO or during the appellate proceed-ings for claiming business losses,that the claim could not be entertained.Finally,he upheld the order of the AO.

3.3.Before us,the AR stated that the advances written off included

- i)travel advances given to the employees,
- ii)deposits for industrial gas cylinders/LPG gas cylinders/telephone/rent etc.,
- iii) advanced to suppliers,
- iv) salary/wages advances and

v)TDS written off. He further argued that in many cases the amounts of advances made were very small as compared to their cost of recovery,that the assessee decided to write them off, that the advances were given for business purposes and were of revenue nature, that there was no element of capital investment, that the expenditure was to be allowed u/s. 37 or section 28 of the Act that the nature of advances clearly showed that they were directly related to the business of the assessee, that during the year under consideration assessee had made advances. He referred to the page number 173, 180 and 181 of the paper book. He relied upon the cases of Sterling Agro Products Processing Private Ltd (13 taxmann.com.174),Radhakrishna Consumer Services Private Ltd (ITA/6862/Mum/2012,AY. 2009-10,dated 21/10/2015),

The DR supported the order of the FAA and stated that assessee has not proved that there was any link between the writing off of the amounts and the business carried out by the assessee.

3.4.We have heard the rival submissions.We find that the AO and FAA had disallowed the advances written off by the assessee,as they were of the opinion that provisions of section 36 did not allow such write off.The FAA held that same could be allowed as per provisions of section 28 of the Act i.e. as a business loss and that the assessee had not produced sufficient evidence to support the claim.We have gone through the details available on pages 173,180-181 of the Paper book.The nature of the advances clearly prove that the assessee had advanced certain amounts for business purposes only.Advances to the employees or advances made for cylinders have to be held to made for carrying out business of the assessee.As far as genuineness of the expenditure is concerned,we find that the AO and FAA have not held that sums were not advanced.The expenses were of revenue nature.As there was direct and intimate relation between the advances made and the business of the assessee,same has to be allowed as regular business expenditure u/s.37 of the Act.It can also be allowed as business loss as per section 28.In short,advnces written off cannot be disallowed in any manner. We would like to reproduce the facts of the order of Sterling Agro Products Processing(P.)Ltd.(supra) and it reads as under:

“Now, we take up the appeals of the Revenue.

12. Revenue has taken common grounds for both the assessment years involved. Its grievance is that ld. CIT(Appeals) deleted disallowance of advance write-off made by the assessee. Such advances given to farmers were for supply of raw materials. As per the Revenue, decision of Hon'ble Apex Court in the case of CIT v. Mysore Sugar Co. Ltd. (46 ITR 649) relied on by ld. CIT(Appeals) was not applicable on facts. 13. Short facts apropos are that assessee in its Profit and Loss account for the impugned assessment years debited under the head “irrecoverable advances from farmers” ` 39,44,289/- and ` 33,38,074/- respectively. As per the assessee, these amounts were given to farmers for supply of raw materials/agricultural produce to the assessee. Since such raw materials were not

supplied by the farmers, Vice President of the assessee-company had taken a conscious decision in consultation with the management to write-off the amounts. However, A.O. was of the opinion that the above mentioned write-off was claimed by the assessee under the head "selling and distribution expenses", but, such expenses were, as per admission of the assessee itself, incurred for procurement of agricultural produce/raw materials. Hence, according to him, this claim under the head "selling and distribution expenses" could not be allowed. He, therefore, disallowed the claim for the respective assessment years.

14. In its appeal before Id. CIT(Appeals), argument of the assessee was that the main raw material for the production of pickle was Gherkins grown by the agriculturists. According to assessee, it was necessary for it to ensure regular supply of Gherkins from the farmers. For this purpose, advance money was given to agriculturists which were adjusted against supplies made by them. However, when there was failure of crop, some farmers failed to honour their commitment for supply of Gherkins. According to assessee, the advances in such circumstances became irrecoverable. As per the assessee, the loss write-off was nothing but a Revenue loss. Id. CIT(Appeals) was appreciative of this contention. According to him, decision of Hon'ble Apex Court in the case of Mysore Sugar Co. Ltd. (supra) supported the claim of the assessee.

15. Now before us, learned D.R., strongly assailing the order of Id. CIT(Appeals), submitted that there was no finding whether such a claim of loss, was out of earlier advances given by the assessee or advances given during the impugned assessment years. According to learned D.R., if it were advances given during the relevant previous year itself, then a write-off could not be allowed since irrecoverability thereof could not be established, in such a short period of time.

16. Per contra, learned A.R. submitted that the advances were given during the years prior to the relevant previous years and write-off was effected only for the reason that supplies of Gherkins were not made by the concerned agriculturists.

17. We have perused the orders and heard the rival contentions. There is no dispute that assessee had given the money for supply of Gherkins to the agriculturists and farmers. There is also no dispute that the concerned farmers or agriculturists failed to supply Gherkins for which advances were given. Gherkins was an essential raw material of the assessee for producing Gherkins pickles. This being so, giving advances to farmers could only be considered as a measure to ensure continuous supply of raw material, which was essential in the nature of business of the assessee. When the raw materials were not received on such advances, it would definitely be a loss to the assessee and such loss would lie in revenue field only. As held by Hon'ble Apex Court in the case of CIT v. Woodward Governor India P. Ltd. (312 ITR 254), the expression "any expenditure" used in Section 37 of the Act cover both "expenses incurred" as well as loss even if the "loss" amount had not gone out of the pocket of the assessee. Hon'ble Apex Court also observed that business losses are deductible u/s. 37(1) of the Act on the basis of ordinary principles of commercial accounting.

We are of the opinion that the advances having failed, assessee was very much right in effecting a writeoff. Though the learned D.R. argued that part of advances written off might have been of the same year, nothing was placed on record to substantiate this contention. We are, therefore, of the opinion that Id. CIT(Appeals) was justified in deleting the disallowances made by the A.O. in this regard.

18. In the result, both the appeals filed by the Revenue are dismissed."

Here,we would also like to refer to the writ petition of Madhav Marbles (362 ITR 647) wherein the Hon'ble Rajasthan High Court has held as under:

"15. Now, coming to the merits of the allowability of deduction as bad advances/bad debts u/s. 36(1)(vii) of the Act, after its amendment with effect from April 1, 1989, the position of law seems to

have been settled by the apex court in the case of T. R. F. Ltd. v. CIT [2010] 323 ITR 397 (SC) wherein it was held as under (page 398) :

"This position in law is well-settled. After April 1, 1989, it is not necessary for the assessee to establish that the debt, in fact, has become irrecoverable. It is enough if the bad debt is written off as irrecoverable in the accounts of the assessee. However, in the present case, the Assessing Officer has not examined whether the debt has, in fact, been written off in accounts of the assessee. When a bad debt occurs, the bad debt account is debited and the customer's account is credited, thus closing the account of the customer. In the case of companies, the provision is deducted from sundry debtors. As stated above, the Assessing Officer has not examined whether, in fact, the bad debt or part thereof is written off in the accounts of the assessee. This exercise has not been undertaken by the Assessing Officer. Hence, the matter is remitted to the Assessing Officer for de novo consideration of the abovementioned aspect only and that too only to the extent of write off."

16. This legal position settled by the hon'ble Supreme Court and in view of the amendment in law with effect from April 1, 1989, admittedly, applicable to the assessment year 1999-2000 involved in the present case, appears to have escaped the attention of the learned Tribunal while passing the original appellate order on May 30, 2008, and again in the impugned order, annexure 1, dated April 27, 2010, u/s. 254(2) of the Act even though the Commissioner of Income-tax (Appeals) had dealt with the same.

17. The requirement on the part of the assessee to establish that debts in question had really turned bad is no longer there after April 1, 1989, and it is left to the business prudence of the assessee to claim such deduction by merely writing off such advances or debts as bad debts in the books of account and debiting the same in the profit and loss account of the assessee. Otherwise, any advance would have been shown on the assets side of the balance-sheet under the heading of "debtors" or "loans and advances" under the heading "current assets". So long as the outstanding debt is shown on the assets side of the balance-sheet, there is no question of claiming the same as deduction from profits and gains of the business computed u/s. 28 of the Income-tax Act. It is only when such a debt or advance turns bad or irrecoverable in the opinion of the assessee, as per the amendment in law after April 1, 1989, a simple book keeping entry to write off the same is enough to entitle the assessee to claim such a deduction. It is not in dispute from the side of the Revenue that such a write off entry was made in the present case by the assessee in its books of accounts. In case even after such a writing off entry is made, if the assessee recovers back any part of such bad debts, it will naturally be credited again in his books and will be taxed in the year of its receipt on recovery.

18. Therefore, going into the requirement of the assessee not establishing the nexus of the advances with his business and computation of profit in the relevant year is of no consequence (emphasis added) and the position of law as obtaining prior to April 1, 1989, has simply changed after April 1, 1989, and the hon'ble Supreme Court decision after the amendment in law in the case of T. R. F. Ltd. (supra), now governs the field."

Considering the above, we decide ground no. 7-9 of the AY.2006-07 in favour of the assessee.

Following the same, ground no.6 for the remaining two AY.s, dealing with the same issue, also stand allowed.

ITA/8127/Mum/2011-AY.2008-09:

4. In the above AY. the AO has raised one more ground and it deals with un-reconciled ITS transaction of Rs. 3.59 lakhs. During the assessment proceedings, the AO found that the assessee

was unable to reconcile receipt of Rs. 3, 59, 952/-. Therefore, he added the said amount to the total income of the assessee under the head unexplained cash credit, invoking the provisions of section 68 of the Act.

4.1. After considering the submission of the assessee, made during the appellate proceedings, the F AA held that the assessee had a contract receipt of Rs. 59, 850.84 lakhs, is that it had reconcile the entire receipt barring minor receipt because of non-availability of information, that the difference constituted a miniscule of the entire contract receipt, that no adverse inference should be drawn in that regard, that it was not the case of the AO that the assessee had received such a petty amount in cash from any of the parties for home it was carrying out the contract. Referring to the order of the tribunal in the case of S Ganesh, the F AA deleted the addition made by the AO.

4.2. During the course of hearing before us,the DR supported the order of the AO, whereas the AR relied upon the order of the FAA.We find that the FAA had given a categorical finding of fact that almost 99.99% of the contract receipts were reconciled, that in absence of certain information the assessee could not reconcile a miniscule of entire contract receipt i.e.Rs.59,850 lakhs. Considering the magnitude of the contract receipt and the unreconciled amount,we are of the opinion that order of the FAA does not need any interference from our side.So,confirming his order,we decide ground number three against the AO.

As a result,appeals filed by the assessee are allowed and the appeals of the AO stands dismissed.
फलतः निर्धारिती द्वारा दाखिल की गई अपीलें मंजूर की जाती हैं और निर्धारिती अधिकारी की अपीलें नामंजूर की जाती हैं.

Order pronounced in the open court on 2nd May, 2018.
आदेश की घोषणा खुले न्यायालय में दिनांक 02 मई,2018 को की गई।

Sd/-
(राम लाल नेगी / Ram Lal Negi)
न्यायिक सदस्य / **JUDICIAL MEMBER**

Sd/-
(राजेन्द्र / Rajendra)
लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक/Dated : 02.05.2018.

Jv.Sr.PS.

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

1.Appellant /अपीलार्थी

2. Respondent /प्रत्यर्थी

- 3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त
5.DR “L ” Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, एल खंडपीठ,आ.अ.न्याया.मुंबई
6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**
उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण, मुंबई /**ITAT, Mumbai.**