

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "J", MUMBAI

Before Shri G S Pannu, Accountant Member
& Shri Pawan Singh, Judicial Member

ITA Nos.6527/Mum/2016
Assessment Year: 2012-13

Dy CIT Central Circle 6(3)(1), Mumbai	Vs.	Instant Traders Pvt. Ltd., Krishna House, Raghuvanshi Mill Compound, Senapati Bapat Marg, Lower Parel (W), Mumbai 400 013
(Appellant)		PAN AAACI9114Q (Respondent)

ITA Nos.7364/Mum/2016
Assessment Year: 2012-13

Instant Traders Pvt. Ltd., Mumbai 400 013	Vs.	Dy CIT Central Circle 6(3)(1), Mumbai
PAN AAACI9114Q (Appellant)		(Respondent)

Revenue By : Ms. Arju Garodia (DR)
Assessee By : Shri Bhupendra Shah (AR)

Date of Hearing : 20.06.2018

Date of Pronouncement : 20.06.2018

ORDER

Per G S Pannu, Accountant Member

These are cross-appeals, directed against the order of the CIT(A)-12, Mumbai, dated 01.08.2016, which in turn has arisen out of the order passed by the Assessing Officer u/s. 143(3) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") relating to A.Y. 2012-13. Since they involve certain common issues, they have been clubbed & heard together and consolidated order is being passed for the sake of convenience and brevity.

2. In the assessee's appeal (ITA No.7364/Mum/2016), following three substantive Grounds of appeal have been raised:

"1. On the facts and circumstances of the case and in law the Ld. Commissioner of Income Tax (Appeals) has erred in confirming the action of the Ld. A.O. in invoking provisions of section 79 of IT. Act, 1961 and further erred in denying the carry forward of losses of Rs. 2,74,33,786/- pertaining to assessment year 2006-07 to 2011-12.

2. On the facts and circumstances of the case and in law the Ld. Commissioner of Income Tax (Appeals) has erred in confirming addition of Rs. 53,40,642/- u/s 14A of IT. Act, 1961.

3. On the facts and circumstances of the case and in law the Ld. Commissioner of Income Tax (Appeals) has erred in confirming addition of Rs. 11,52,959/- on account of common amenities and maintenance expenses."

3. In so far as facts relating to Ground no.1 are concerned, a perusal of the assessment order reveals that during the year under consideration there has been a change of share holding pattern of the assessee company and the Assessing Officer invoked section 79 of the Act. Broadly speaking, section 79 of the Act as it prevailed for the year under consideration prohibits carry forward and set off of loss incurred in any year prior to the previous year in which the change in share holding has taken place in case of a corporate assessee to the extent specified in the section. Only aspect that is sought to be emphasized before us by the appellant is that section 79 of the Act can be invoked only in the year when the assessee seeks carry forward and set off of a loss. In this context, the learned representative explained that having regard to the total income determined by the Assessing Officer in order passed u/s. 143(3) read with an order passed u/s. 154 of the Act, dated 12.06.2015, the current year income from business has been assessed at a loss and, no set off has been claimed for brought forward loss. It was therefore, contended that the instant year is not a correct year of determination of the impact of section 79 of the Act in as much as the same ought to be dealt with in the assessment of the assessment year in which the assessee actually claims the set-off of brought forward loss in the subsequent assessment year and not in the impugned

assessment year. Therefore, as per the assessee, in the impugned assessment year the Assessing Officer could not have considered and directed for denial of carry forward of set off in future years. For the said proposition, learned representative referred to the decision of co-ordinate Bench dated 07.09.2017 in the case of Khajrana Ganesh Properties Private Limited (ITA No.2629/Mum/2014 for A.Y. 2010-11), wherein by relying on the judgment of Hon'ble Supreme Court in the case of Manmohan Das (Deceased) 59 ITR 699, such plea of the assessee has been upheld.

4. On the other hand, on this aspect, the learned DR has merely reiterated the stand of the lower authorities.

5. After having carefully considered the rival submissions, we find that the limited plea of the assessee before us is to the effect that the dispute regarding the denial of the carry forward of loss on the basis of prohibition contained in section 79 of the Act be considered by the Assessing Officer in accordance with law in the subsequent year where the assessee claims actual set off. An identical situation has been considered by our co-ordinate Bench in the case of Khajrana Ganesh Properties Private Limited (supra), wherein one of us is part of the Bench. The Tribunal, by relying the judgment of Hon'ble Supreme Court in the case of Manmohan Das (Deceased) (supra), noted that whether or not loss in any year can be carried forward and set off in the subsequent year is liable to be determined by the Assessing Officer who deals with the assessment of such subsequent year. In fact, the Hon'ble Supreme Court specifically noted that the decision recorded by the Assessing Officer, who computes the loss in preceding year that loss cannot be set off in the subsequent year is not binding on the assessee in the subsequent actual year of set off. Considered in this light, the co-ordinate Bench in the case of Khajrana Ganesh Properties Private Limited (supra) came to conclude that it is only the Assessing Officer dealing with the assessment of the assessment year where the assessee has claimed set off of the loss is competent and not the Assessing Officer of the earlier year. The relevant decision of the Co-ordinate Bench is as under:

"We have carefully considered the rival submissions and find that the issue before us can be disposed off in the light of the point of law laid down by the Hon'ble Supreme Court in the case of Manmohan Das

(Deceased) (supra). As per the Hon'ble Supreme Court, whether the loss in any year may be carried forward to the following year and set-off against the income of the subsequent year is liable to be determined by the Assessing Officer who deals with the assessment of such subsequent year. The Hon'ble Supreme Court further noted that a decision recorded by the Assessing Officer who computes the loss in a previous year that the loss cannot be set-off against the income of the subsequent year is not binding on the assessee in the subsequent actual year of set-off. Considered in this light, in our view, the Assessing Officer in the instant year had no jurisdiction to give a finding that the loss of Rs.7,96,21,402/- cannot be carried forward and set-off against the income of the subsequent year. Therefore, such observations/directions of the Assessing Officer, in our view, are bereft of jurisdiction and are accordingly directed to be removed. So however, our aforesaid decision should not be understood as any reflection on the merit or otherwise of invoking of Sec. 79 of the Act prohibiting carry forward and set-off of loss in certain situations. The application of Sec. 79 of the Act shall be open to be considered by the Assessing Officer in the subsequent year while evaluating the claim of the assessee for set-off of the impugned business loss. As a consequence of our aforesaid discussion, we set-aside the order of CIT(A) and direct the Assessing Officer to remove the directions relating to denial of carry forward and set-off of loss of Rs.7,96,21,402/-. Thus, on this aspect, assessee succeeds for statistical purposes."

6. Considering in the aforesaid light, in our view, so far as the instant assessment year is concerned, the Assessing Officer is not competent to give a finding that the loss cannot be carry forward and set off against the income of the subsequent year. Accordingly, the matter is remanded back to the file of the Assessing Officer to remove the direction relating to denial of carry forward and set-off of loss. However, our direction should not be interpreted to be any reflection on the merits of invoking section 79 of the Act, which prohibits carry forward and set off of loss in specified situations. The same shall be open to be considered by the Assessing Officer in the subsequent year of actual set-off while evaluating the claim of the assessee for set off of the impugned business loss.

7. As a consequence of our aforesaid discussion, we set aside the order of the CIT(A) and direct the Assessing Officer to expunge the directions so far as it relates to denial of carry forward and set off of loss. Thus, on this aspect the assessee succeeds for statistical purposes only.

8. In so far as Ground of appeal no.2 raised by the assessee is concerned, the same arises from a disallowance made by the Assessing Officer u/s. 14A of the Act. Notably, in the cross-appeal filed by the Revenue the only issue raised is with regard to the disallowance deleted by the CIT(A) which was made by the Assessing Officer u/s. 14A of the Act. Since the cross-grounds relate to the same issue they are being taken up together.

9. A perusal of the assessment order reveals that the Assessing Officer disallowed ₹ 53,40,642/- u/s. 14A of the Act by applying Rule 8D(2) of the Rules. The disallowance comprised of ₹ 48,40,642/- out of the interest expenditure as per Rule 8D(2)(ii) of the Rules and ₹ 5 lacs out of administrative expenditure as per Rule 8D(2)(iii) of the Rules thereby totalling to ₹ 53,40,642/-. Before the CIT(A) assessee raised varied submissions, which have been noted in para 5 of his order and one pertinent point raised was that during the year under consideration, assessee has not earned any tax free income and, therefore, no disallowance u/s. 14A of the Act was merited. In this context, we find that before the Assessing Officer also, assessee had asserted that it has neither earned any tax free income and nor debited any expenditure relating to equity investment of ₹ 10,00,00,030/- made in the shares of Ginger Enterprises P. Ltd. We find that the CIT(A) has determined the said ground as under:

"9.3 I have carefully perused the assessment order and the submission of the appellant. It is seen that appellant has not received any tax free income and this fact is not disputed by the AO. The AO noted that the appellant suo moto disallowed the expenditure. Hence, I find force in the submission of the appellant. Therefore, AO is directed to restrict the disallowance made suo moto by the appellant. The ground of appeal n.3 is partly allowed."

Notably, as per the CIT(A) in the absence of the assessee having received any exempt income, the disallowance u/s. 14A was not merited except to the extent of amount suo moto disallowed by the assessee. Against such a decision, the assessee as well as the Revenue is in appeal before us.

10. In our view so far as the decision of the CIT(A) in principle is concerned, the same is justified in view of the direct decision of the Hon'ble Delhi High Court in the

case of Cheminvest Limited vs. CIT378 ITR 33. We also find no error on the part of the CIT(A) in directing the AO to retain the suo moto disallowance made by the assessee in this regard if any. Therefore, in our view, the ground raised by the assessee as well as the Revenue is liable to be dismissed. We hold so.

11. The last ground in the appeal of the assessee is with regard to an addition of ₹ 11,52,959/- which has been earned by the assessee on account of providing common amenities and maintenance charges from the tenants. It was noted that apart from rentals the assessee was recovering amount on account of amenities and maintenance charges from the tenants, who were given house property on rent. The Assessing Officer noted that the assessee was incurring expenditure on maintenance of the property under various heads of water charges, cleaning charges, electricity charges, security charges, repair charges etc., amounting to ₹ 11,52,959/- which was net off recoveries made from the tenants. The Assessing Officer disallowed such expenditure noticing that while computing income under the head "Income from house property" the statutory allowance of 30% on account of repairs etc., has been allowed. This position has been affirmed by the CIT(A) also and not being satisfied the assessee is in appeal before us.

12. Before us, the short point raised by the assessee is based on the decision of the Delhi Bench of the Tribunal in the case of Sir Sobha Singh & Son (P.) Ltd. 41 taxmann.com 378, which is to the effect that the Annual Letting Value (ALV) of a property would not include the consideration of other amenities like watchman, sweepers, gardeners, etc., which has been provided by the owner as per separate agreement with the tenant. At the time of hearing, it was put across before the learned representative to establish that the impugned receipts by way of provision of amenities, etc. was contracted with the respective tenants by separate agreements. There was no material on record to establish the same and, therefore, factually speaking the amounts received by the assessee towards such amenities is to be taken as a part of rental arrangement. Thus, the ratio of the decision of Delhi Bench of the Tribunal, in the case of Sir Sobha Singh & Son (P.) Ltd (supra), is not attracted to the facts of the present case. In our view, the disallowance made by

the Assessing Officer has been rightly sustained by the CIT(A) which we hereby confirm. Thus, on this aspect the assessee fails.

13. Resultantly, the appeal of the assessee is partly allowed and that of the Revenue is dismissed.

The above decision was pronounced in the open court at the conclusion of hearing in the presence of both the parties today i.e. 20th June, 2018.

Sd/-
(Pawan Singh)
JUDICIAL MEMBER

Mumbai, Dated : 20th June, 2018.

Sd/-
(G S Pannu)
ACCOUNTANT MEMBER

SA

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The CIT(A), Mumbai.
4. The CIT , Mumbai.
5. The DR, 'J' Bench, ITAT, Mumbai

BY ORDER

//True Copy//

(Assistant Registrar)
Income Tax Appellate Tribunal, Mumbai