IN THE INCOME TAX APPELLATE TRIBUNAL "C", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, AM
&
SHRI SANDEEP GOSAIN, JM

ITA No.4093/Mum/2013
(**Assessment Year :2009-10**)

M/s. Philip Capital (India) Pvt. Ltd., (formerly known as MF Global Sify Securities India Pvt. Ltd., IInd Floor, Modern Centre Block C, Mahalaxmi Mumbai	Vs.	ACIT, Circle 4(2) Mumbai
PAN/GIR No.AABCR6382C		
(Appellant)	..	**(Respondent)**

ITA No.3017/Mum/2013
(**Assessment Year :2009-10**)

M/s. Philip Commodities India Pvt. Ltd., (formerly known as MF Global Commodities India Pvt. Ltd., No.1, 2nd Floor, C-Block Modern Centre, 101 K.Khadya Marg Jacob Circle, Mahalaxmi Mumbai – 400 011	Vs.	ACIT, Circle 6(3) Mumbai
PAN/GIR No.AACCR6675H		
(Appellant)	..	**(Respondent)**

Assessee by	Shri Nishant Thakkar & Ms. Jasmine
Revenue by	Shri Himanshu Sharma
Date of Hearing	**27/09/2018**
Date of Pronouncement	**03/10/2018**

आदेश / O R D E R

***PER R.C.SHARMA (A.M)*:**

ITA No.4093/Mum/2013

This is an appeal filed by the assessee against the order of CIT(A)-8, Mumbai dated 05/03/2013 in the matter of order passed u/s.143(3) of the IT Act.

2. Rival contentions have been heard and record perused.

3. Facts in brief are that assessee is engaged in the business of broking clear and depository services. During the course of scrutiny assessment, AO made disallowance u/s.14A r.w.r. 8D amounting to Rs.5,88,310/-, which were confirmed by CIT(A) and now assessee is before us.

4. We have heard rival contentions and found from record that during the year under consideration the assessee has earned total exempt income of Rs.1,63,773/- in the form of dividend. Following the proposition of law laid down by the Delhi High Court in the case of Chem Invest Ltd., 281 CTR 447, we direct the AO to restrict the disallowance u/s.14A to the extent of exempt income.

5. In ground No. 2 the assessee is aggrieved for addition / disallowance of interest of Rs.21,29,317/-. We found that CIT(A) has restored the matter back to the file of the AO to verify the use of the interest bearing funds. It was pointed out by learned AR that still no effect has been given by AO to the direction of CIT(A). Accordingly, we direct the AO to verify the factual position and delete the disallowance of interest as per law.

6. Ground No.3 relates to addition of Rs.87,79,527/- on account of 'Unexplained Deposits'. We found that issue is covered by the order of the ITAT in assessee's own case for the A.Y.2008-09 dated 01/09/2015. Precise observation of the Tribunal was as under:-

> *"7. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record. We have deliberated upon the issue under consideration and after giving a thoughtful consideration to the facts of the case find substantial force in the contentions raised by the ld. A.R before us. We find that it remains as a matter of fact that the assessee by way of a consistent practice which was prevalent in its trade line, had in order to facilitate early credit of money from the clients, advised them to deposit the money directly in the "Client account" maintained by the assessee with the banks at respective places. Though the clients as advised, after depositing the amounts in the bank account would intimate the same by way of letter or e-mail alongwith the proof of deposit to the assessee, who on the basis of the said communication would reconcile the deposits with the credits in the bank account, however, in certain cases either due to noncommunication by the clients or for some other reason the amounts deposited in the bank account of the assessee would not be reconciled. We had deliberated on the assessment records of the assessee for the A.Y. 2006-07 and A.Y. 2007-08, and are persuaded to be in agreement with the claim of the assessee that it was consistently, as a matter of practice, after the lapse of a period of three years, offering the*
> *unidentified amounts deposited by the clients in its bank account, for tax. We find that in the backdrop of the directions of SEBI to the President/Executive directors of all the Stock Exchanges, therein contemplating strict adherence of its rules regulating both the manner*
> *and the mode of dealing with the amounts received by the member brokers from its clients, which made it obligatory on their part to forthwith deposit such money received from the clients to the current*
> *or deposit account at a bank to be kept in the name of the member or in one consolidated client account for all the clients, the money deposited in the "Client account" maintained with the banks, would by no means loose the color and character as that of being the money of the clients. That still further, the strict regulations monitoring the withdrawal of the amounts from the "Clients account", which clearly provided an embargo as regards utilization of the amounts credited in the "Clients account" for any other purpose, except for those contemplated therein, thus duly established that the amounts received in the "Clients account" exclusively belonged to the respective clients and would in no way be available to the assessee for being utilised for a purpose other than for the benefit of the client, which too had to be in strict compliance of the parameters laid down by SEBI. We thus in the backdrop of our aforesaid observations are thus of the considered view that it can safely be concluded that the assessee was holding the amounts lying in the "Clients account" only in a fiduciary capacity. We find that the issue that an amount held by a person in a fiduciary capacity cannot be brought to tax as an unexplained credit u/s*

68, is no more res integra in light of the judgment of the ***Hon'ble High Court of Bombay*** *in the case of* ***CIT Vs. Tanubhai D. Desai(1972) 84 ITR 713 (Bom)****, wherein the Hon"ble High Court after referring to the rights and regulations of solicitors, in respect of the amounts of their clients held by them in a fiduciary capacity, had observed as under:-*

> *"The relevant principle laid down by the House of Lords in its judgment in that case is that if a person in a fiduciary position receives any financial benefit arising out of the use of the property of the beneficiary, he cannot keep it unless he is authorised to do so. Applying that principle the House of Lords held that on the facts of the case the solicitor was not authorised to keep the interest either by custom or by implied agreement, although, as a matter of fact, a similar practice had long been followed by a number of solicitors in the United Kingdom. As seen earlier, the relevant rules of this High Court do not permit a solicitor to treat the moneys received by him from or on account of his clients as his personal moneys and such moneys are held by him in a fiduciary capacity. Even the income received from such moneys must equally be held by the solicitor in a fiduciary capacity. What the solicitor actually does with the income, i.e., whether he appropriates it to himself or not, is, in our opinion, a matter of no consequence. If he appropriates it to himself, it would simply amount to a breach of his fiduciary relationship and whatever may be the consequences in law would follow. But his unauthorised act of converting any part of the corpus or even the income derived therefrom which is not in accordance with the*
> *provisions of the rules of this High Court would not convert those amounts held by him in a fiduciary capacity into moneys held by him beneficially, for himself. In the said case before the House of Lords the solicitor had in fact converted the interest earned in that case to his own use, but none-the-less the House of Lords, on the basis that the moneys and, therefore, the interest also was held by the solicitor in a fiduciary capacity, held that the taxation must proceed on the basis that the income did not in fact belong to him and was not liable to be taken into computation in his personal assessment. A similar view has been taken by a Division Bench of the Calcutta High Court in CIT vs. Sandersons & Morgans (1970) 75* ***ITR*** *443 (Cal)."*

We are of the considered view that in the backdrop of the aforesaid judgment of the Hon'ble High Court, now when the amounts aggregating to Rs. 29,91,792/-(supra) credited in the "Clients account" maintained by the assessee with the bank, could safely be held to be the clients money which were held by the assessee in a fiduciary capacity, therefore, the same could not be assessed as the unexplained credit in its hands under Sec. 68 of the Act". We are of the considered view that in the backdrop of our aforesaid observations, the amount of Rs. 29,91,792/- (supra) could not have been assessed as the unexplained cash credit of the assessee under Sec. 68. We are also of the view that now when the revenue had been accepting the aforesaid practice of the assessee in offering the unidentified amounts received from the clients and forming part of the "Clients account" for tax, after

> *a lapse of a period of three years, and on the said basis had assessed the amounts of Rs. 2,51,576/-(supra) and Rs. 3,50,554/-(supra) offered by the assessee for tax after a lapse of a period of three years in AY: 2006-07 and AY: 2007-08, respectively, therefore, a different yardstick and an inconsistent approach would not be permissible on its part for the year under consideration."*

7. As the facts and circumstances during the year under consideration are same, respectfully following the order of the Tribunal in assessee's own case, we direct the AO to delete the addition made on account of 'Unexplained Deposit' u/s.68 of the IT Act.

8. Ground No.4 was not pressed. The same is therefore, dismissed in limini as not pressed.

9. Ground No.5 relates to disallowing expenditure incurred on foreign travelling.

10. Rival contentions have been heard and record perused. AO had made adhoc disallowance of 50% which was confirmed by CIT(A). We found that in the A.Y.2008-09, the Tribunal have dealt with the similar issue vide its order dated 01/09/2017 and similar adhoc disallowance so made on account of travelling expenses were deleted after observing as under:-

> ***"16.*** *We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record in context of the issue under consideration. We have given a thoughtful consideration to the issue before us and find substantial force in the contentions raised by the ld. A.R before us. We have deliberated on the material available on record and find that the assessee is a multinational company which primarily caters to its clients, which consists of Foreign Institutional Investors (FII) and Non Resident Indians (NRI"s) based in foreign countries. We are of the considered view that in the backdrop of the very nature of the business of the assessee, it was indispensably required on its part to hold regular meetings with its clients, in order to both maintain as well as facilitate furtherance of the*

business relationships with them. We are of the considered view that in light of the business of the assessee whose Head office, as well as the offices of the other group companies are located outside India, frequent visits by the directors of the assessee company and its employees could not be ruled out. We now advert to the details of the foreign travelling expenses, which as claimed by the lower authorities had not been furnished by the assessee. We find that the assessee in order to substantiate the complete details of the foreign travelling expenses incurred by it to the last of the paisa, had placed on record the complete details of the foreign travelling expenses incurred for the year ended 31 March, 2008, aggregating to Rs.91,94,433/-(Page 122 of „APB"). We have deliberated on the details furnished by the assessee and find that the same is not merely an eyewash, but rather is duly supported by substantial in house details placed on record by the assessee (Page 220-261) of the „APB". We are persuaded to be in agreement with the contentions of the ld. A.R that there was an impeccable procedure for sanctioning by the assessee company of the foreign travelling undertaken by its employees/directors, as well as approval of the expenses incurred therein. We have given a thoughtful consideration to the issue before us and after deliberating on the material available on record in the backdrop of the contentions raised by the authorized representatives for both the parties, are unable to persuade ourselves to be in agreement with the view arrived at by the lower authorities in respect of the proportionate disallowance of the foreign travelling expenses in the hands of the assessee. We thus being of the considered view that the foreign travelling expenses which are irrebutably found to have been incurred by the assessee wholly and exclusively for the purpose of its business, therefore, find no justification for any proportionate disallowance of the said expenditure in the hands of the assessee. We thus delete the disallowance of Rs.45,97,216/-(supra) made by the A.O in respect of the foreign travelling expenses. The order of the CIT(A) confirming the aforesaid disallowance is thus set aside on the issue under consideration. The ***Ground of appeal No. 4*** *raised by the assessee before us is allowed."*

11. As the facts and circumstances are same and the lower authorities have just followed their order of the earlier year i.e., A.Y.2008-09, and since the same was reversed by the Tribunal, respectfully following the observation of Tribunal in assessee's own case, we do not find any justification for the adhoc disallowance so made by the AO.

12. In the result appeal of the assessee is allowed in part.

ITA No.3017/Mum/2013

13. This is an appeal filed by the assessee against the order of CIT(A)-12, Mumbai dated 18/01/2012 for A.Y.2009-10 in the matter of order passed u/s.143(3) of the IT Act.

14. In this appeal, assessee is aggrieved for disallowance of loss on account of sale of units in mutual fund scheme.

15. Rival contentions have been heard and record perused.

16. Facts in brief are that assessee is engaged in business of commodities broking. During the course of scrutiny assessment, AO observed that assessee has debited an amount of Rs. 25,18,333/- towards loss on sale of current investment. The assessee was asked to furnish the complete details of the loss on sale of current investment. Assessee vide its letter dated 10.11. 2011 furnished the detail of the same

17. On perusal of the same AO observed that assessee has incurred profit/loss on sale of mutual fund units held as investments in the Balance Sheet Since the Mutual Funds were shown as investments in the Balance Sheet filed by the assessee, hence the loss on the same cannot be claimed in `the profit and loss account of the assessee as it is not a business expense within the provisions of Section 30 to Section 43D of the Act.

18. By the impugned order, CIT(A) confirmed the action of the AO.

19. From the record, we found that loss was incurred on sale of mutual funds held as investment, therefore, same was capital loss, accordingly AO has correctly declined the same as business loss. However, such capital loss is eligible to be carried forward to the subsequent assessment year. Accordingly, we modify the order of the lower authorities and allow such capital loss to be carried forward for set off in the future year.

20. In the result, appeal of the assessee is allowed in part.

21. In the result, appeals of assessee are allowed in part.

Order pronounced in the open court on this 03/10/2018

Sd/-	Sd/-
(SANDEEP GOSAIN)	**(R.C.SHARMA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 03/10/2018
Karuna Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai