

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

**BEFORE SHRI SANDEEP GOSAIN (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 1451/MUM/2009
Assessment Year: 2005-06**

Dhiren A. Modi 6, Sahyog
CHS. Ltd., MG Cross Road
No. 3, Kandivali (W),
Mumbai-400067.

Vs.

ITO Ward 25(3)(2), C-11,
BandraKurla Complex, Bandra
(E), Mumbai-400051.

**PAN No. AEOPM2083A
Appellant**

Respondent

Assessee by : Mr. Nishit Gandhi, AR
Revenue by : Mr. Ram Tiwari, DR

Date of Hearing : 03/08/2018
Date of pronouncement: 31/10/2018

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the assessee. The relevant assessment year is 2012-13. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-XXVI, Mumbai [in short CIT(A)] and arises out of the assessment completed u/s 143(3) of the Income Tax Act 1961, (the 'Act').

2. During the course of hearing on 23.04.2018, the Ld. counsel of the assessee submits that he would not like to press the 4th, 5th and 7th grounds of appeal. As per the signed undertaking by the Ld. counsel, the above grounds of appeal are dismissed as not pressed.

3. The 1st ground of appeal is that the AO has passed order u/s 143(3) which is bad in law and against the principles of natural justice and the same be quashed.

Having gone through the materials available on record, we find that before passing the order dated 26.12.2007 u/s 143(3) of the Act, the Assessing Officer (AO) had given sufficient opportunity to the assessee of being heard. Therefore, we agree with the observation of the Ld. CIT(A) on the above ground of appeal and dismiss the 1st ground of appeal.

4. The 2nd ground of appeal is against the order of the Ld. CIT(A) confirming the disallowance of carried forward of Long Term Capital Loss (LTCL) of Rs.32,72,006/- by the AO.

4.1 The facts are that the AO disallowed the claim of the assessee to carry forward the LTCL on sale of shares and business loss on the ground that the return of income was filed belatedly on 15.09.2005 u/s 139(4) of the Act.

4.2 In appeal, the Ld. CIT(A) held at para 3.1 as under:

“I have gone through the submission of assessee/appellant and perused the assessment order completed by AO. The AO has clearly brought on record in para 4 of assessment order that the due date of filing of the return was 31.08.2005 for the assessee/appellant and he was not required to get its accounts audited as per the provisions of section 44AB of the I.T. Act. It is also mentioned that the assessee/appellant was not having any business receipts to be credited in the P&L a/c let alone above Rs.40 lakhs as per the statutory

requirement in this regard. AO has also held in this background that the assessee/appellant has got its account audited u/s 44AB for sake of claiming the carry forward losses. As per the provisions of section 80 of the I.T. Act, a person is not allowed to carry forward the loss not determined in pursuance of the return filed in accordance with the provisions of section 139(3) of the Act. In this case, the assessee/appellant has filed its return of income on 15.09.2005 declaring total income of Rs.72,516/- which was clearly beyond the time allowed under the provisions of Act. The AO has therefore, correctly ignored the tax audit report u/s 44AB of the I.T. Act and held that the return of income for the AY 2005-06 was filed u/s 139(4) of the Act and to be treated as belated return. The AO has thus properly disallowed the carry forward of LTCL to the extent of Rs.32,72,006/- as the accounts were not required to be audited u/s 44AB of the Act and return was required to be filed on before 31.08.2005. The action of the AO is confirmed and grounds of appeal No. 2 and 3 are dismissed.”

4.3 The Ld. counsel of the assessee submits that as the AO has not rejected the audit report u/s 44AB of the Act, no disallowance can be made on account of LTCL of Rs.32,72,006/-. It is stated that the assessee had conducted his operation in future and option trading-the total purchases of Rs.11498517189.87 and sales of Rs.11498276917.25 (net Rs.240272.65). The Ld. counsel relies on the provisions of section 43(5) of the Act and the guidelines issued by the Institute of Chartered Accountants of India (ICAI) in respect of F&O transactions.

4.4 On the other hand, the Ld. DR, referring to para 3.1 of the order of the Ld. CIT(A) dated 29.12.2008 submits that there is no merit in the above contentions of the assessee and the same be dismissed.

4.5 We have heard the rival submissions and perused the relevant materials on record. As mentioned hereinbefore, the Ld. counsel of the assessee has contended that the assessee had conducted his operation in future and option trading-the total purchases of Rs.11498517189.87 and sales of Rs.11498276917.25 (net Rs.240272.65). This aspect has not been examined either by the AO or the Ld. CIT(A). Therefore, we set aside the order of the Ld. CIT(A) in respect of the above ground of appeal and remit the matter to the file of the AO to examine it and pass a fresh order as per the provisions of the Act, after giving the assessee, reasonable opportunity of being heard. We direct the assessee to file the relevant documents/evidence before the AO. Thus the 2nd ground of appeal is allowed for statistical purposes.

5. The 6th ground of appeal is against the order of the Ld. CIT(A) confirming the disallowance of business loss of Rs.5,19,940/-.

5.1 In the assessment the AO disallowed the aggregate claim of expenditure of Rs.5,19,940/- on the ground that no business activities were carried out during the impugned assessment year by the assessee.

5.2 In appeal, the Ld. CIT(A) held at para 6.2 as under:

“I have considered the submissions made by the assessee/appellant and also gone through the relevant documents filed during appeal proceedings related to the 3 proprietary concerns listed above. The claim of expenses include depreciation on motor car, interest on loan, car insurance, telephone expenditure and other expenses of audit/accounting etc. totalling to Rs.5,19,940/- for the 3 different concerns. It is also noticed from the assessment order of the AO as also from the past record of the

assessee/appellant's case, specifically the appeal order relevant to AY 2002-03 and 2003-04, that the concern listed above were closed long back. It is also noted that in the AY 2002-03, assessee/appellant himself furnished that M/s Tirupati Enterprises has no business activity except investment in stock market. There is no other income except interest income in this year also which normally to be taxed as income from other sources. No expenditure is allowed to be deducted as per provisions of I.T. Act from interest income like depreciation, interest on car loan and others as claimed in the different concerns. No nexus is therefore proved by the assessee/appellant for claiming expenditure from the income of the 3 concerns. The AO has also brought on record that assessee/appellant failed to brought on record any facts even the intention of the assessee/appellant to engage in the business transaction during the year and to conduct any gainful activities. In view of these facts and judgment cited by AO on the issue under dispute, the action of the AO in disallowing expenditure is confirmed. The ground of appeal dismissed accordingly."

5.3 The Ld. counsel submits that the assessee is proprietor of M/s Tirupati Enterprises and DM Securities. It is stated that the assessee had some fixed expenses i.e. depreciation and interest on car loan as well as variable expenses which are to be incurred even though there is no turnover. The assessee had expressed his intention to conduct the business. The Ld. counsel further submits that neither the AO nor the Ld. CIT(A) has brought any evidence on record to show that the assessee had no intention to conduct the business. Therefore, it is stated that the business expenses of Rs.5,19,940/- be allowed.

Further it is stated that the AO has grossly erred in assuming that no business has been carried out by the assessee. It is stated that the

said assumption is incorrect since the AO has himself accepted the income from F&O transactions and therefore, there is no question of not carrying out any business.

5.4 On the other hand, the Ld. DR relies on para 6.2 or the order of the Ld. CIT(A) and submits that the disallowance of Rs.5,19,940/- be confirmed.

5.5 We have heard the rival submissions and perused the relevant materials on record. As the contentions of the assessee that the business in F&O transactions have not been examined by the AO and the same has a bearing on the present issue, we set aside the order of the Ld. CIT(A) and restore the matter to the AO to examine it and pass a *de novo* order, after giving an opportunity of being heard to the assessee. Thus the 6th ground of appeal is allowed for statistical purposes.

6. The 8th ground of appeal is against the order of the Ld. CIT(A) confirming the addition of Rs.1,25,35,608/- made on account of remission of credit liabilities u/s 41(1) of the Act.

6.1 During the course of assessment proceedings, the AO noticed that in the balance sheet of M/s Tirupati Enterprises, the assessee has shown sundry creditors of goods at Rs.1,25,35,608/-. The details are as under:

Name of the Creditor	Amount
Shree Enterprises	Rs.83,17,628/-
S Navinchandra & CO	Rs.53,095/-

Subject Brothers	Rs.41,64,885/-
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The AO vide notice dated 12.10.2007 asked the assessee to file the details such as address, nature and date of credit, amount of original credit, balance as on date etc. In response to it, after repeated non-compliance, the assessee just submitted the names and outstanding amounts as on 31.03.2005, which were already available with the return of income. The only additional detail submitted before the AO was the year of credit i.e. 1999. As the assessee failed to file complete details, the AO made an addition of Rs.1,25,35,608/- u/s 41(1) of the Act.

6.2 In appeal, the Ld. CIT(A) held at para 8.3 of his order dated 29.12.2008 which is as under:

“8.3. I have considered the submissions made by the assessee/appellant as also the fact mentioned by the AO in the assessment order and in the remand report as above. The fact remains that assessee/appellant has never produced the identification or confirmation from the 3 creditors listed above. In the remand report, AO has clearly brought out the fact that letters issued to these creditors were returned unserved with remarks 'left' or 'not known'. It was again countered to the assessee/appellant to produce the confirmation and other details including return of Income but the assessee/ appellant failed miserably during the assessment proceedings, remand proceedings as also during the appellate proceedings. This leaves no doubt that the creditors are not non-existence and the remission of liability was correctly brought to the tax by the AO u/s. 41(1) of the I.T. Act. As regards claim of the assessee/appellant that he has not received amount from the debtors, the AO has already mentioned that even if the amount was not received, the same can be claimed as Debt u/s,36(i)(vi) of the I.T. Act which was not the

case of assessee/appellant. The fact remains that the assessee/appellant has failed to bring any evidence or proof on record which shows that liability was still payable. Even the identification of such creditors was not proved. In view of this, the action of the AO for adding the amount u/s. 41(1) of the I.T. Act at Rs.1,25,35,608/- is confirmed. This ground of appeal is dismissed.”

6.3 Before us, the Ld. counsel of the assessee submits that the AO has not rejected the audited accounts of the appellant and neither he has pointed out any defect therein. Therefore, even the amounts mentioned therein ought to be accepted. The said amounts are standing as credit balances payable to various parties since the last many years and which have also been accepted by the department including by way of scrutiny assessment u/s 143(3) and also u/s 147 of the Act. Admittedly, the liabilities were accepted in earlier years, since no such issue has been discussed in earlier years or earlier assessments. The Ld. counsel further submits that the assessee had produced various details pertaining to the origin of these liabilities which have been completely overlooked by the AO as well as the CIT(A). Further it is submitted by him that a copy of the remand report was never provided to the appellant for his comments and therefore, it is not possible either to respond or even provide any clarification on the queries, if any, conducted by the AO. Relying on case laws, the Ld. counsel submits that once the AO fails to prove that the deduction was allowed in the earlier years, no addition could be made to the income of the assessee u/s 41 of the Act.

6.4 On the other hand, the Ld. DR refers to para 8.3 of the order of the Ld. CIT(A) and submits that the addition of Rs.1,25,35,608/- be confirmed.

6.5 We have heard the rival submissions and perused the relevant materials on record. As per section 41(1), where an allowance or deduction has been made in the assessment for every year in respect of (i) loss, (ii) expenditure, or (iii) trading liability incurred by the assessee and subsequently, during any previous year, he (the same assessee) has obtained, whether in cash or any other manner, whatsoever:

(i) any amount in respect of such loss or expenditure; or

(ii) some benefit in respect of such trading liability by way of remission or cessation thereof,

then, the amount obtained by the assessee or the amount of the liability which is extinguished shall be deemed to be profits and gains of business or profession and accordingly chargeable to income-tax of that previous year. It may be mentioned that the business or profession, in respect of which the allowance or deduction has earlier been made, may or may not be in existence in the previous year in which such amount is obtained or the benefit accrued to him.

A perusal of the documents available on record indicates that the assessee failed to file before the AO complete details by which a conclusion could have been arrived at. The AO has also failed to keep in mind the above provisions of section 41(1) of the Act.

Therefore, we set aside the order of the Ld. CIT(A) which has followed the order of the AO and restore the matter back to the AO for a *de novo* order as per the provisions of the Act after giving reasonable opportunity of being heard to the assessee. We direct the assessee to file the relevant documents/evidence before the AO. Thus the 8th ground of appeal is allowed for statistical purposes.

7. In the result, the appeal is partly allowed.

Order pronounced in the open Court on 31/10/2018.

Sd/-
(SANDEEP GOSAIN)
JUDICIAL MEMBER

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

Mumbai;

Dated: 31/10/2018

Rahul Sharma, Sr. P.S.

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,

(Sr. Private Secretary)
ITAT, Mumbai