

**IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA BENCH 'A', KOLKATA  
[BEFORE SHRI P.M. JAGTAP, VICE-PRESIDENT (KZ) & SHRI A.T. VARKEY, JM]**

**ITA No. 1747/Kol/2017  
Assessment Year: 2013-14**

***D.C.I.T, CIRCLE - 3(1) Kolkata.....Appellant***  
***P-7, Chowringhee Squar, 4<sup>th</sup> Floor,***  
***Aayakar Bhawan, Room No. 19,***  
***Kolkata - 700 069.***

***M/s. Atibir Hi-Tech Pvt. Ltd. ....Respondent***  
***Block-7B, 7<sup>th</sup> Floor,***  
***Abdul Hamid Street,***  
***Kolkata - 700 069.***  
***[PAN : AABCA 4466 C]***

**C.O. No. 118/Kol/2017  
(Arising out of ITA No. 1747/Kol/2017)  
Assessment Year: 2013-14**

***M/s. Atibir Hi-Tech Pvt. Ltd. ....Cross-Objector***  
***Block-7B, 7<sup>th</sup> Floor,***  
***Abdul Hamid Street,***  
***Kolkata - 700 069.***  
***[PAN : AABCA 4466 C]***

***D.C.I.T, CIRCLE - 3(1) Kolkata.....Respondent***  
***P-7, Chowringhee Squar, 4<sup>th</sup> Floor,***  
***Aayakar Bhawan, Room No. 19,***  
***Kolkata - 700 069.***

**Appearances by:**

*Shri Radhey Shyam, CIT, DR appearing on behalf of the Revenue*  
*Shri D.S. Damle, FCA appearing on behalf of the Assessee*

Date of concluding the hearing : January 16, 2019

Date of pronouncing the order : March 29, 2019

**ORDER**

**PER P.M. JAGTAP, VICE-PRESIDENT (KZ)**

This appeal is preferred by the Revenue against the order of Ld. CIT (A) - 11, Kolkata dated 04.04.2017 and the same is being disposed of along with the cross-objection filed by the assessee being C.O. No. 118/Kol/2017.

2. In Ground No. 1, the Revenue has challenged the action of the Ld. CIT(A) in deleting the addition of Rs. 40,55,027/- made by the AO on account of cessation of liability u/s 41(1).

3. The assessee in the present case is a company which is engaged in the business of manufacturing and dealing in M.S. Ingot, M.S. Bar, M.S. Rod coil etc. The return of income for the year under consideration was filed by it on 26.09.2013 declaring a total income of Rs. 1,38,62,730/-. In the balance sheet filed along with the return of income, credit balances of M/s. Dudani Fuels Pvt. Ltd. and M/s. Mahavir Trading Company were appearing at Rs. 13,08,633/- and Rs. 27,46,394/- respectively under "sundry creditors". During the course of assessment proceedings, the assessee was unable to produce the details of payments, if any, made to the said creditors. The assessee was also unable to explain why the payments were not made to the said creditors till then. The AO, therefore, treated both the said creditors as bogus and made an addition to Rs. 40,55,027/- to the total income of the assessee u/s 41(1) of the Act.

4. The addition made by the AO u/s 41(1) on account of the alleged cessation of the liability towards the two creditors was challenged by the assessee in the appeal filed before the Ld. CIT(A) and after considering the submission made by the assessee as well as the material available on record, the Ld. CIT(A) deleted the said addition made by the AO for the following reasons given in paragraph No. 5.3 of his impugned order:

*“From the perusal of the documents presented by the assessee during the course of the appellate proceedings, it is clear that the assessee had submitted confirmation of the balance from Mahabir Trading Company as well as Dudani Fuels Pvt. Ltd. These submissions were made by the assessee before the A.O. by an undated covering letter which has also been produced before the undersigned. Under the given facts and circumstances the creditors are confirming their claim of receipt from the assessee and there is no variation of their claim from the account being shown by the assessee as payable to them, it cannot be concluded that the liability of payment in respect of these two creditors had ceased to exist. I have perused the legal authorities cited by assessee along with its argument and I am of the opinion that the onus cast upon the A.O. to bring to record circumstances under which it can be decided that there has been cessation of liability has not been discharged. Accordingly, ground no. 5, 6 and 7 are being allowed.”*

5. We have heard the arguments of both the sides on this issue and also perused the relevant material available on record. The learned DR has relied on the order of the AO in support of the Revenue's case on this issue and submitted that the confirmations of the sundry creditors filed by the assessee before the Ld. CIT(A) to show the existence of the said creditors were not filed before the AO. The learned counsel for the assessee, on the other hand, has submitted that the said confirmations were filed by the assessee even before the AO during the course of assessment proceedings and this factual position is confirmed even by the learned DR on perusal of the relevant assessment records available with him. It is thus clear that evidence in the form of confirmations of the concerned two creditors were filed by the assessee before the AO to establish the existence of the said creditors, but the Assessing Officer still treated the said creditors as bogus or non-existent and made addition u/s 41(1) on the ground that assessee's liability towards the said creditors had

ceased to exist. As rightly contended by the learned counsel for the assessee, onus was on the AO to establish that the liability towards the said creditors had ceased to exist in the year under consideration and since the said onus was not discharged by the AO, we are of the view that the Ld. CIT(A) was fully justified in deleting the addition made by the AO u/s 41(1). We accordingly uphold the impugned order of the Ld. CIT(A) giving relief to the assessee on this issue and dismiss Ground No. 1 of the Revenue's appeal.

6. As regards Ground No. 2, it is observed that the issue involved therein relating to the deletion by the Ld. CIT(A) of the disallowance of Rs. 25,28,870/- made by the A.O. u/s 14A is squarely covered inter alia by the decision of Hon'ble Punjab and Haryana High Court in the case of CIT vs Hero Cycles (P) Ltd. (189 Taxman 50) as well as by the decision of Coordinate Bench of this Tribunal in the case of REI Agro Ltd. vs DCIT (144 ITD 141) wherein it was held that no disallowance u/s 14A could be made if there was no exempt income actually earned by the assessee during the relevant year. In the present case, no exempt income was earned by the company during the year under consideration and this being the undisputed position, we find no infirmity in the impugned order of the Ld. CIT(A) deleting the disallowance made by the A.O. u/s 14A by relying inter alia on the decision of Hon'ble Punjab and Haryana High Court in the case of Hero Cycles (P) Ltd. (supra) as well as the decision of Coordinate Bench of this Tribunal REI Agro Ltd. (supra). Ground No. 2 of Revenue's appeal is accordingly dismissed.

7. In Ground No. 3, the Revenue has challenged the action of the Ld. CIT(A) in allowing the claim of the assessee for set off of loss recorded under the head “profits and gains of business or profession” against the addition made by the A.O. u/s 68.

8. In the computation of total income filed along with its return of income, the assessee-company had declared commodity profit of Rs. 10,00,33,775/- received from Subh Commodities Pvt. Ltd. under the head “Profits and Gains of business or profession”. The enquiry made by the A.O. revealed that the claim of the assessee of having earned the commodity profit was not genuine. He accordingly treated the amount of commodity profit credited by the company in its books of account as unexplained cash credit u/s 68. This change in the head of income by the A.O. resulted in a substantial loss under the head “Profits and Gains of business or profession”. The A.O. however did not allow the set off of the said loss against the income assessed u/s 68 by relying on the decision of Hon’ble Kerala High Court in the case of M/s. Kerala Sponge Iron Ltd. vs CIT.

9. In the appeal filed before the Ld. CIT(A), the assessee challenged the action of the A.O. in not allowing the set off of business loss against the income assessed u/s 68 and after considering the submissions made by the assessee as well as the material available on record, the Ld. CIT(A) allowed the claim of the assessee for the following reasons given in paragraph no. 4.3.3 of his impugned order:

*“In respect of Ground No. 3 and 4, the assessee has argued that even if the income shown by the assessee is assessed u/s 68, the assessee is eligible for the set off u/s 71 of the I.T. Act. I have carefully examined the legal*

*position standing in respect of this issue before 01.04.2017. Only by amendment in the Finance Act, 2016, Section 115BBE does not allow set off of income assessed as cash credit u/s 68 against the loss under any other head as per the provisions of Sec. 71. The legislature in all its wisdom has decided not to allow set off of loss under any provisions of this Act w.e.f. 01.04.2017 in computing the income as per the provisions of Sec. 115BBE. This amendment by itself clarifies the legislative intent that for the year under consideration set off of loss under any other head except under the head "Capital Gain" is allowable from the assessed u/s 68."*

10. The learned DR strongly supported the order passed by the A.O. on this issue and submitted that the decision of the Tribunal rendered in the case of Shri Pradeep Kumar Todi vs ITO vide its order dated 22.09.2017 passed in ITA No. 984/Kol/2017 fully supports the case of the Revenue on this issue.

11. The learned counsel for the assessee, on the other hand, submitted that the issue involved in the case of Kerala Sponge Iron Ltd. (supra) relied upon by the A.O. in the assessment order as well as in the case of Shri Pradeep Kumar Todi (supra) cited by the learned DR in support of the Revenue's case was relating to the set off of brought forward business losses against the income assessed u/s 68 as unexplained cash credit. He contended that the issue involved in the present case however is different in as much as it relates to the claim of the assessee for set off of business loss of current year against the income assessed u/s 68. He has contended that this issue as involved in the assessee's case is squarely covered in favour of the assessee by the following judicial pronouncements:

*"1. ITO vs Prism Share Trading Pvt. Ltd. (ITA No. 5650/M/17) dtd. 30.11.2018.*

*2. DCIT vs Atha Mines Pvt. Ltd. (ITA No. 601/Kol/14) dtd. 05.04.2017.*

3. Pr. CIT vs Atha Mines Pvt. Ltd. (ITA No. 158 of 2018) (Cal HC).
4. Pitamber Commodity Futures Pvt. Ltd. vs ACIT (ITA No. 863/Jp/17) dtd. 21.03.18.
5. ACIT vs Sai Bhaskar Irons Pvt. Ltd. (ITA No. 108/Viz/16) dtd. 13.02.18.”

12. We have considered the rival submissions and also perused the relevant material available on record. As rightly contended by the learned counsel for the assessee, the issue involved in the case of Kerala Sponge Iron Ltd. (supra) relied upon by the A.O. of his order and in the case of Shri Pradeep Kumar Todi (supra) cited by the learned DR at the time of hearing before the Tribunal was different in as much as claim was made in the said cases for set off of brought forward business losses of the earlier years against the income assessed u/s 68 for the current year whereas the issue involved in the present case is relating to the claim of the assessee for set off of business loss of the current year against the income assessee u/s 68 in the same year. It is observed that this issue as involved in the assessee's case is squarely covered in favour of the assessee by the various judicial pronouncements cited by the learned counsel for the assessee. In one of such decisions rendered in the case of ITO vs M/s. Prism Share Trading Pvt. Ltd. vide order dated 30.11.2018 passed in ITA No. 5650/M/2017, the Mumbai Bench of this Tribunal has decided the similar issue vide paragraph No. 10 which reads as under:

*“We shall now advert to the observation of the CIT(A) that the loss suffered by the assessee from F&O transactions could be 'set off against the income of Rs.5,73,96,307/- assessed by the A.O under Sec. 68 of the Act. We find that Sec. 115BBE was brought on the statute by the Finance Act, 2012 with effect from 01.04.2013. On a perusal of the said statutory provision, as was then so available on the statute and was applicable to the case of the assessee for the year under consideration i.e A.Y. 2013-14, no restriction was placed as regards 'set off of losses against the income*

*referred to in Sec. 68, 69, 69A, 69B, 69C and 69D. Rather, the legislature in all its wisdom by amending Sec. 115BBE vide Finance Act, 2016 w.e.f 01.04.2017 had only w.e.f A.Y. 2017-18 placed a restriction on 'set off of losses, in addition to raising of any claim of expenditure and allowance against such income. The fact that the aforesaid amendment of Sec. 115BBE by the Finance Act, 2016, w.e.f 01.04.2017 is prospective in nature can safely be gathered from a perusal of the CBDT Circular No. 3/2017, dated 20.01.2017. In the backdrop of our aforesaid observations, it can safely be gathered that there was no embargo to claim 'set off of losses in the year under consideration i.e A.Y. 2013-14. We thus in terms of our aforesaid observations are persuaded to subscribe to the view taken by the CIT(A) that the loss suffered by the assessee from F&O transactions could be 'set off' against the income of Rs.5,73,96,307/- that was allegedly assessed by the A.O under Sec. 68 of the Act. The Ground of appeal No. 2 raised by the revenue is dismissed."*

13. As the issue involved in the present case as well as all the material facts relevant thereto are similar to that of M/s. Prism Share Trading Pvt. Ltd., we respectfully follow the decision rendered by the Tribunal in the said case and uphold the impugned order of the Ld. CIT(A) allowing the claim of the assessee for set off of loss under the head "Profits and Gains of business or profession" against the income assessed u/s 68. Ground No. 3 of the Revenue's appeal is accordingly dismissed.

14. At the time of hearing before the Tribunal, the learned counsel for the assessee has not pressed the issue raised in the cross-objection filed by the assessee by submitting that the same has become infructuous in the light of the decision of the Tribunal on the issue raised in Ground No. 3 of the Revenue's appeal. The cross-objection filed by the assessee is accordingly dismissed as infructuous.

**15. In the result, the appeal of the revenue as well as cross-objection of the assessee are dismissed.**

Order Pronounced in the Open Court on 29<sup>th</sup> March, 2019.

Sd/-  
(A.T. Varkey)  
JUDICIAL MEMBER

Sd/-  
(P.M. Jagtap)  
VICE-PRESIDENT

**Dated: 29/03/2019**

Biswajit, Sr. PS

Copy of order forwarded to:

1. M/s. Atibir Hi-Tech Pvt. Ltd., Block-7B, 7<sup>th</sup> Floor, 20B, Abdul Hamid Street, Kolkata – 700 069.
2. DCIT, Circle – 3(1), Kolkata.
3. The CIT(A)
4. The CIT
5. DR

True Copy,

By order,

Assistant Registrar / H.O.O.  
ITAT, Kolkata