

आयकर अपीलीय अधिकरण “G” न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL “G” BENCH, MUMBAI

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री राजेश कुमार लेखा सदस्य के समक्ष ।

BEFORE SRI MAHAVIR SINGH, JM AND SRI RAJESH KUMAR, AM

आयकर अपील सं./ ITA No. 5988/Mum/2017

(निर्धारण वर्ष / Assessment Year 2007-08)

Shantanu Sheorey Aquakult Ltd. (new name: M/s 52 Weeks Entertainment Ltd.), 97, Shivprasad Building, Tarabai Hall, Marine Drive, Mumbai-400 002	Vs.	The Dy. Commissioner of Income Tax, Circle 4(3)(2) Mumbai.
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)
स्थायी लेखा सं./PAN No. AABCS6170K		

आयकर अपील सं./ ITA No. 5710/Mum/2017

(निर्धारण वर्ष / Assessment Year 2007-08)

The Dy. Commissioner of Income Tax, Circle 4(3)(2) Mumbai.	Vs.	Shantanu Sheorey Aquakult Ltd. (new name: M/s 52 Weeks Entertainment Ltd.), 97, Shivprasad Building, Tarabai Hall, Marine Drive, Mumbai-400 002
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	None
प्रत्यर्थी की ओर से / Respondent by	:	Shri Chaudhary Arunkumar Singh, DR

सुनवाई की तारीख / Date of hearing:	17-01-2019
घोषणा की तारीख / Date of pronouncement :	12-04-2019



आदेश / ORDER

महावीर सिंह, न्यायिक सदस्य/
PER MAHAVIR SINGH, JM:

In these two appeals, one appeal filed the assessee and other appeal filed by the Revenue are arising out of the orders of Commissioner of Income Tax (Appeals)-9, Mumbai [in short CIT(A)], in Appeal No. CIT(A)-9/Cir.4/372 & 373/2015-16 vide order dated 23.06.2017, 05.06.2017. The Assessment was framed by the Dy. Commissioner of Income Tax, Circle 4(3)(2) Mumbai (in short 'DCIT'/'ITO'/'AO') for the A.Y. 2007-08 vide order dated 10.03.2015 under section 143(3) of the Income Tax Act, 1961 (hereinafter 'the Act').

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2. The only issue in this appeal of assessee is against the order of CIT(A) in dismissing the appeal as unadmitted and not condoning the delay. For this assessee has raised the following ground: -

"The Learned CIT(A) erred on facts in law and under the circumstances in :-

- a) failing to condone the delay in filing the appeal on frivolous grounds.*
- b) refusing to accept the genuine reasons which prevailed, resulting into delay in filing the appeal in time.*

The appellant respectfully submits that the delay in filing the appeal was due to reasons beyond



its control and the appellant are people of artistic bend. The appellant further submit that except for this one instance, the appellant has always complied with the law and pray that the delay in thing appeal be condoned and the appeal be decided on merits.”

3. Brief facts are that the assessment under section 143(3) of the Act was completed on 07.12.2009. Thereafter, the assessment was reopened under section 147 and accordingly, reassessment order was passed under section 143(3) read with section 147 of the Act dated 19.03.2015. The assessee filed appeal before CIT(A) against assessment order dated 28.10.2015. According to CIT(A), the assessee filed an appeal late by 185 days. According to CIT(A), the assessee has not filed any documentary evidences or has not filed any affidavit as on oath. The CIT(A) observed as under: -

“I have considered the submissions of the appellant and find that the same is not acceptable. Therefore, it is obligatory of on the part to manage the time and comply the requirement of law within the due date.

The appellant is free to misplace the papers wherever he or she may so wish, but the compliance has to be ensured within time and which has not been done in the present case. Even otherwise, the appellant’s submission which has been filed by the Id. AR is not supported by documentary evidence, nor has



any affidavit on oath been filed by the appellant company.”

Accordingly, he dismissed the appeal as not admitted. Aggrieved, assessee came in appeal before Tribunal.

4. We have gone through the arguments made by the learned Sr. Departmental Representative and also the order of CIT(A). We noticed from the above finding of CIT(A) that the assessee was not allowed opportunity to file supporting documentary evidences nor affidavit to support the contention. Even it not coming out of the order of CIT(A) when this appeal was fixed and whether opportunity was provided to the assessee to file documentary evidences or affidavit in support of condonation petition. Hence, to allow one more opportunity to the assessee, we set aside the order of CIT(A) and remand the matter back to his file for adjudicating the condonation of delay first and in case delay is condoned, he will decide the issue on merits. Needless to say that the CIT(A) will provide adequate opportunity of being heard to the assessee. This appeal of the assessee is set aside and allowed for statistical purposes.

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5. The only issue in this appeal of Revenue is against the order of CIT(A) deleting the penalty levied by the AO under section 271(1)(c) of the Act. For this Revenue has raised the following ground No. 1: -

“1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing the AO to delete the penalty levied under section 271(1)(c) of ₹ 1,77,60,430/-,



without appreciating the fact that assessee company has willfully & deliberately furnished inaccurate particulars of income leading to concealment of income.”

6. We have heard the rival contentions on this issue and gone through the facts and circumstances of the case. We noted that the CIT(A) has deleted the penalty by considering the submissions of the assessee, the penalty order of the AO and the assessment order. The CIT(A) deleted the penalty by observing as under: -

“5.3.3. I have the considered the grounds on which the penalty has been levied by the AO and the detailed submissions made by the Id.AR. It is evident from the facts of the case that in the return of income filed the appellant has claimed loss of Rs.5,27,64,193/- on account of sale of capital assets as business loss because all the capital assets sold were used as business assets and such loss was duly assessed by the AO after detailed verification and obtaining explanation by order passed u/s. 143(3) dated 07.12.2009. During the original assessment proceedings, the appellant made detailed submissions which are enclosed with the appellant's paper book according to which the total loss of Rs.5.27 crores comprised of loss on sale of freehold land Rs.1.41 crores, loss on sale of buildings Rs.3.81 crores and small balance loss on account of sale of



furniture fittings and plant and machinery. The said loss was claimed by the appellant by relying on section 32(1)(iii) of the Act and all the losses mentioned above were duly reflected in the audited balance sheet, in the schedule of assets. In view of the above detailed clarification filed with supporting evidences it is evident that company has made disclosures of transaction giving rise to loss in the return of income and the same were duly considered while passing assessment order u/s. 143(3).

5.3.4. I have also considered the appellant's argument that the loss incurred of Rs.5,27,64,193/- was not set off till today and therefore the loss has elapsed and hence there is no question of any concealment of income or any Tax to be evaded.

5.3.5. I have also considered the appellant's argument that the return of income filed by Chartered Accountant and whether the loss is allowable as business loss or capital gain / loss are for the consultants of the company to decide and the Directors of the company are persons of artistic orientation completely unaware of the niti girties of the case law. In view of the same, the company argues no fault can be found with the appellant has regards the levy of penalty since



the same was claimed by the company under a bonafide belief relying of CA's advice."

Aggrieved, revenue came in appeal before Tribunal.

7. We noted that the loss claimed by the assessee relying on section 32 (1) (iii) of the Act. However, in the re-proceedings the AO disallowed the said loss in entirety simply for the reason the loss could not be claimed as the assessee has not proved that the blocks in respect of the loss is claimed ceased to exist. The said loss on sale of land was remained to be separately shown as long term loss the return since it was bona-fidely believed that since land used for the business of the (fish farming during the relevant year) is a business asset, any loss arising there was to be treated as business loss similar to that on sale of building. These facts were brought to the notice of the AO during the assessment proceedings by way of submissions dated 10.02.2015. As such, the whole averment of the AO that evidence is brought on record as to the cessation of block is totally baseless. In view of the above, the assessee argued that there is no question, concealing any particulars of income, nor any furnishing of inaccurate particulars.

8. We find from the facts of the case that in the return of income filed the assessee has claimed loss of Rs.5,27,64,193/- on account of sale of capital assets as business loss because all the capital assets sold were used as business assets and such loss was duly assessed by the AO after detailed verification and obtaining explanation by order passed u/s 143(3) dated 07.12.2009. We also noted that during the original assessment proceedings the assessee made detailed submission which are enclosed with the assessee's paper book and according to which the total loss of Rs.5.27 crores comprised of loss on sale of freehold land



Rs.1.41 crores, loss on sale of buildings Rs.3.81 crores and small balance loss on account of sale of furniture fittings and plant and machinery. The said loss was claimed by the assessee by relying on section 32(1)(iii) of the Act and all the losses mentioned above were duly reflected in the audited balance sheet, in the schedule of assets. In view of the above detailed clarification filed with supporting evidences, it may further be seen that company had made disclosures of transaction giving rise to loss in the return of income and the same were duly considered while passing assessment order u/s. 143(3) of the Act. We have also considered the loss incurred of Rs.5,27,64,193/- was not set off till today and therefore the loss has elapsed and hence there is no question of any concealment of income or any Tax to be evaded. We also noted that the return of income are filed by Chartered Accountants and whether the loss is allowable as business loss or capital gain loss, are for the consultants of the company to decide and the directors of the company are engaged in the business affairs and may not be fully conversant with the complication of the case law. In view of the same, we are of the view that the CIT has rightly deleted the penalty and we confirm the same. The appeal of Revenue is dismissed.

9. In the result, the appeal of assessee set aside and allowed for statistical purposes and the appeal of Revenue is dismissed.

Order pronounced in the open court on 12-04-2019.

Sd/-

(राजेश कुमार / RAJESH KUMAR)

(लेखा सदस्य / ACCOUNTANT MEMBER)

Sd/-

(महावीर सिंह / MAHAVIR SINGH)

(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 12-04-2019.

सुदीप सरकार, व.निजी सचिव / Sudip Sarkar, Sr.PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai