

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

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

**ITA No. 4850/MUM/2012
Assessment Year: 2009-10**

Shri Pawan Rajkumar
Droliya, 2-A-183,
Winderemere CHS,
Oshiwara, Andheri West,
Mumbai-400053.

Income Tax Officer
Vs. 25(3)(3), C-11, Room
No. 304, Pratyakshar
Bhavan, Bandra Kurla
Complex, Bandra (East),
Mumbai-400051.

PAN No. AEDPD6516R
Appellant

Respondent

Assessee by : Mr. Khushal Shah, AR
Revenue by : Mr. Abi Rama Kartikiyen, DR

Date of Hearing : 20/02/2019
Date of pronouncement: 16/05/2019

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the assessee. The relevant assessment year is 2009-10. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-35, 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. The grounds of appeal filed by the assessee read as under:

1. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in allowing the disallowance made by the Assessing Officer of Rs.25,66,301/- being speculated loss adjusted against business income.

2. On the facts and in the circumstances of case and in law, the Ld. CIT(A) erred in allowing the disallowance made by the Assessing officer of Rs.62,64,440/- on account of purchases from M/s Radhe Enterprises as notice u/s 133(6) returned un-served.
 3. On the facts and in the circumstances of case and in law, the Ld. CIT(A) erred in allowing the addition made by the Assessing Officer of Rs.140,13,680/- on account of unsecured loan as notice u/s 133(6) returned un-served.
3. During the course of assessment proceedings, the Assessing Officer (AO) noticed that the appellant has combined the activities of M&D Gulf Chemical Business and Share Trading Business. The total sales were shown at Rs.5,51,23,512/- and other income at Rs.1,80,591/-. In response to a query raised by the AO, the assessee filed the details for verification and the AO observed that the assessee had tried to set off speculation loss of Rs.25,66,301/- against business income by arriving at combined net profit of Rs.3,56,901/-. As there was no compliance to the opportunities given by the AO to explain its case, the AO disallowed speculation loss of Rs.25,66,301/-.
4. Further, the notices issued by the AO to Radhe Enterprises and loan creditors were returned back as un-served. The AO noted that the assessee further failed to provide new address of them for further verification. Though the assessee was informed by the AO *vide* order sheet noting dated 31.10.2011, the assessee filed the loan confirmation on 14.11.2011. Observing that verification has not been facilitated by the assessee and onus lies on him to prove the loans to be genuine, the AO made an addition of Rs.62,64,440/- towards business creditors and Rs.1,40,13,680/- towards loan creditors.

5. In appeal, the Ld. CIT(A) held that there is no merit in the contentions of the appellant that the disallowance of Rs.25,66,301/- was covered within the meaning of section 43(5) and the appellant's loss on this score is not loss during the ordinary course of business and the AO was justified in treating the transaction speculation loss and not allowing its set off.

Regarding the addition of Rs.62,64,440/- made by the AO, the Ld. CIT(A) observed that it was the onus of the appellant to prove that Radhe Enterprises was a genuine party, the transaction with the same was carried out in the earlier year and the amount referred as above was taken into consideration for taxation in earlier year. As the appellant failed to discharge its onus regarding the identity of the party and genuineness of transaction, the Ld. CIT(A) confirmed the above addition of Rs.62,64,440/- made by the AO.

Regarding the addition of Rs.1,40,13,680/- made by the AO, the Ld. CIT(A) observed that it was the onus of the appellant to prove that the loan creditors were genuine parties and the transactions with them were carried out by account payee cheques and they had capacity to part with such huge amount of loan out of their own funds. As the appellant failed to discharge its onus regarding the identity of the parties and genuineness of transactions, the Ld. CIT(A) confirmed the above addition of Rs.1,40,13,680/- made by the AO.

6. We find that Mr. Khushal Shah, Ld. counsel of the assessee has filed an application before the ITAT on 20.07.2018 regarding non-appearance and non-receipt of notices. Therein, he has stated that :

“The appellant due to his family issues and depression could not provide the consultants with any information needed for completing the assessment and Ld. Assessing Officer passed the Assessment order accordingly.

The Ld. CIT(A) has passed a non-speaking order. The documents and submissions were not considered by the Ld. CIT(A). The appellant was not giving an opportunity of being heard even after submission of documents.”

A perusal of the assessment order passed by the AO clearly indicates that the appellant could not file complete details before him.

In order to arrive at a proper finding, we set aside the order of the Ld. CIT(A) and restore the matter to the file of the AO to make a *de novo* order after giving the assessee reasonable opportunity of being heard. We direct the assessee to file the relevant documents/evidence before the AO.

7. In the result, the appeal filed by the assessee is allowed for statistical purpose.

Order pronounced in the open Court on 16/05/2019.

Sd/-
(SANDEEP GOSAIN)
JUDICIAL MEMBER

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

Mumbai;

Dated: 16/05/2019

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