

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN "SMC" BENCH, COCHIN**

Before Shri George George K, Judicial Member

ITA No.156/Coch/2018 : Asst.Year 2010-2011

Sri.Nihas Basheer Air Express Tours & Travels Vekkinar Alappuzha - 688 001. PAN : AIMPB7247E.	Vs.	The Income Tax Officer Ward - 3 Alappuzha.
(Appellant)		(Respondent)

Appellant by : Sri.R.Srinivasan, CA
Respondent by : Smt.A.S.Bindhu, Sr.DR

Date of Hearing : 13.06.2019	Date of Pronouncement : 14.06.2019
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ORDER

This appeal at the instance of the assessee is directed against the Commissioner of Income-tax (Appeals)'s order dated 31.01.2018. The relevant assessment year is 2010-2011.

2. Two issues are raised in this appeal, viz. -
 - (i) Whether the CIT(A) is justified in confirming the addition of Rs.26,29,436 u/s 68 of the I.T.Act?
 - (ii) Whether the CIT(A) is justified in confirming the A.O.'s action in treating the loss from share trading business as speculative loss?

3. I shall adjudicate the above issues as under:-

Whether the CIT(A) is justified in confirming the addition of Rs.26,29,436 u/s 68 of the I.T.Act?

4. The assessee had taken loan from various persons amounting to Rs.26,29,436. The details of above said loan are as follows:-

Sl. No.	Name	Date	Amount (Rs.)	Mode of payment
1.	Faizal Ahemed	23.11.2009	2,00,000	Cash
2.	Sudhakaran Nair	23.11.2009 27.01.2010	1,00,000 2,00,000	Cash Cash
3.	Mohamed Basheer	27.01.2010 16.02.2010 16.03.2010 16.03.2010	1,00,000 1,00,000 80,000 60,000	Cash Cash Cash Cash
4.	P.A.Abdul Rahman	21.05.2009	5,00,000	--
5.	P.A.Mohamed	25.06.2009 20.07.2009	4,90,000 5,19,426	-- --
6.	Abdul Hakkim	22.06.2009	1,70,000	Cash
7.	Sayana Hakkim	23.11.2009	1,50,000	Cash
			26,29,436	

4.1 The Assessing Officer, after examining the details of each of the credits, held that the above creditors are not genuine and added the sum of Rs.26,29,436 u/s 68 of the I.T.Act. The A.O. held that even after repeated requests none of the creditors were not produced for examination. The A.O. concluded that the assessee failed to prove the creditworthiness of the creditors and the genuineness of the transactions.

4.2 Aggrieved by the order of the Assessing Officer in making the addition u/s 68 of the I.T.Act, the assessee preferred an appeal to the first appellate authority. The CIT(A) confirmed

the view taken by the Assessing Officer. The relevant finding of the CIT(A) reads as follows:-

“4.1.3 The facts of the case, the grounds of appeal and the arguments of the assessee and Department have been considered. Under section 68 of the Act, the assessee is required to prove identity, genuineness and creditworthiness of the creditor to discharge burden cast on the assessee. As it is evident from the assessment order that the assessee failed to prove the creditworthiness of the creditors. Even during the appeal proceedings also the learned A.R. categorically admitted that the creditworthiness cannot be proved by producing the relevant Bank statements etc. as the creditors are not willing to share such detail. In view of these facts, it is held that the assessing officer has rightly assessed these unexplained credits under section 68 of the Act and the ground raised against this issue is dismissed.”

4.3 Aggrieved by the order of the CIT(A), the assessee has raised this issue before the Tribunal. The learned Counsel for the assessee submitted that the additions were made u/s 68 for the reason that the creditors could not be produced before the Assessing Officer. It was prayed that one more opportunity may be granted to the assessee so that the creditors could be produced before the Assessing Officer and he can prove the creditworthiness of the creditors and the genuineness of the transactions.

4.4 The learned Departmental Representative was duly heard.

4.5 I have heard the rival submissions and perused the material on record. Admittedly the confirmation letters were filed by most of the creditors except in the case of Sri.Abdul Hakkim. The Assessing Officer did not believe the said loan transactions primarily for the reason that the creditors could not be produced by the assessee before the Assessing Officer for examination. In the interest of justice and equity, I am of the view that one more opportunity be granted to the assessee to prove the creditworthiness of the creditors and the genuineness of the transactions. For this purpose, this issue is restored to the files of the A.O. The assessee shall co-operative with the Department and furnish necessary evidences to prove his case that the loan transactions are genuine. With the above said directions, this issue is restored to the files of the A.O.

4.6 In the result, ground No.2 raised is allowed for statistical purposes.

Loss from trading whether it is speculative or not?

5. In the return of income filed by the assessee, no income / loss was declared from share transaction. As per CIB information, the assessee had traded in shares amounting to Rs.9.95 crore during the relevant assessment year. In the course of assessment proceedings, the assessee admitted that he did share transaction through HDFC Securities Limited and India Infoline Limited. The assessee submitted before the Assessing Officer that the transactions were mainly trading

and taking position in derivatives. It was submitted that these transactions were in the nature of ordinary trade and not a speculation as defined in section 43(5) of the I.T.Act. The assessee had computed loss at Rs.13,99,870 from the share transactions and requested to set off the loss against other income. The assessee also filed letters dated 26.12.2012 and 30.01.2013 stating the loss incurred on share transaction business is not a speculative transaction and the same needs to be set off against other business income. The Assessing Officer, however, rejected the contentions raised by the assessee and held the loss incurred from share trading transaction was speculative loss and same cannot be set off against other income. The relevant observations of the Assessing Officer read as follows:-

"I have gone through the arguments of the assessee in detail. As the assessee did not claim the loss in the RI, his fresh claim for allowing the loss cannot be entertained. Without prejudice to the above, his claim cannot be allowed on the following count also.

- *The assessee could not satisfactorily prove that the nature of business as non speculative.*
- *Since the actual delivery of share scrips does not take place both for purchase as well as sales, sec 43(5) applies loss in such transaction cannot be set off against business income.*
- *Section 73 and section 43(5) operate in different fields. Section 73 applies even to shares transferred with delivery. Section 73 deals with nature of business whereas Section 43(5) deals with nature of transaction.*

- Loss from speculate transactions cannot be allowed to be set off against other incomes but only against income from speculation business.

Therefore, the assessee's claim for allowing the loss on share transaction in view of this matter also not allowable. Accordingly the claim of loss to be set off is rejected."

5.1 Aggrieved by treating the share trading loss as speculative loss, the assessee preferred appeal to the first appellate authority. The CIT(A) confirmed the view taken by the Assessing Officer. The relevant finding of the CIT(A) reads as follows:-

"4.4 The arguments made by the learned AR do not explain why the loss from share trading should be allowed and has not submitted any evidence to disprove the conclusions drawn by the Assessing Officer in the assessment order. In view of the same, it is held that the loss from share trading is not allowable for set off against the income assessed and the ground raised on this issue is dismissed."

5.2 Aggrieved by the order of the CIT(A), the assessee has raised this issue before the Tribunal. The learned AR reiterated the submissions made before the Income-tax Authorities. The learned Departmental Representative, on the other hand, relied on the assessment order and the order of the CIT(A).

5.3 I have heard the rival submissions and perused the material on record. No evidence was produced before the

Tribunal to prove that the loss incurred in share trading transactions are not speculative loss. The Assessing Officer has categorically found that the share trading transactions are speculative transaction. The factual finding of the A.O., which was confirmed by the CIT(A) in the absence of contra evidence, cannot be disturbed. Therefore, I confirm the orders of the Income-tax authorities on this issue. It is ordered accordingly.

5.4 In the result, ground No.3 raised by the assessee is rejected.

6. In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

Order pronounced on this 14th day of June, 2019.

Sd/-
(George George K.)
JUDICIAL MEMBER

Cochin ; Dated : 14th June, 2019.
Devdas*

Copy of the Order forwarded to :

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

BY ORDER,

(Asstt. Registrar)
ITAT, Cochin