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

BEFORE SHRI M.BALAGANESH, AM
&
SHRI RAM LAL NEGI, JM

ITA No.7337/Mum/2017
(**Assessment Year :2013-14**)

Dy. Commissioner of Income Tax- 3(3)(1) Room No.609, 6th Floor Aayakar Bhavan M.K.Road, Mumbai – 400 020	Vs.	M/s. Rama Cylinders Pvt. Ltd. 181, Maker Tower, "E", Cuffe Parade, Mumbai – 400 005
PAN/GIR No.AACCR8653D		
(Appellant)	..	**(Respondent)**

Revenue by	Shri D.G. Pansari
Assessee by	Shri Sashi Tulsiyan
Date of Hearing	**05/09/2019**
Date of Pronouncement	**11/09/2019**

आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

This appeal in ITA No.7337/Mum/2017 for A.Y.2013-14 arises out of the order by the ld. Commissioner of Income Tax (Appeals)-8, Mumbai in appeal No.CIT(A)-8/IT-06/16-17 dated 13/09/2017 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 22/02/2016 by the ld. Dy.

Commissioner of Income Tax-3(3)(1), Mumbai (hereinafter referred to as ld. AO).

2. The Ground Nos. 1 & 2 raised by the revenue are with regard to deletion of disallowance made u/s.14A of the Act by the ld. CIT(A) both under normal provisions of the Act as well as in the computation of book profits u/s.115JB of the Act.

2.1. We have heard rival submissions. From the perusal of the facts available on record, we find that the assessee had not derived any exempt income during the year under consideration and accordingly, we hold that the applicability of provisions of Section 14A of the Act would not arise. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of Maxopp Investment reported in 402 ITR 640 and also on the decision of Hon'ble Delhi High Court in the case of DCIT vs. IL & FS Energy Development Co. Ltd., reported in 399 ITR 483 (Del). Respectfully following the same, we find that the ld. CIT(A) had rightly deleted the disallowance made u/s.14A of the IT Act, which does not require any interference. Accordingly, the Ground Nos. 1 & 2 raised by the revenue are dismissed.

3. The Ground Nos. 3 & 4 are with regard to deletion of disallowance of depreciation on factory building and plant & machinery of Rs.10,90,771/-.

3.1. We have heard rival submissions. We find that the ld. CIT(A) deleted this disallowance by placing reliance on the order of this Tribunal in A.Yrs.2006-07 to 2009-10 in assessee's own case, in ITA No.3670/Mum/2012 to 3673/Mum/2012 dated 20/10/2014 wherein it was held as under:-

> *"14. What we find from the records and submissions made, is that the assessee has allocated all such expenses towards general expenses, which the AO has reproduced in his order. This, in our opinion is in accordance with the ratio laid down by the Apex Court in the case of Challapalli Sugars Ltd.*
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> *15. Applying the ratio laid down by the Hon'ble Supreme Court and later on by the Hon'ble Bombay High Court in the case of Nirlon Synthetic Fibers & Chemicals Ltd. (supra), we set aside the order of CIT(A) on this issue and direct the AO to allow the depreciation on factory building and plant & machinery, as claimed by the assessee."*

3.2. The ld. AR also stated that the appeal preferred by the Revenue before the Hon'ble High Court has been dismissed due to low tax effect. Hence, we hold that the matter has attained finality pursuant to the order of this Tribunal in the earlier years on the impugned issue. Accordingly, we do not deem it fit to interfere with the order of the ld. CIT(A) granting

relief to the assessee. Accordingly, the ground Nos. 3 & 4 raised by the revenue are dismissed.

4. The Ground Nos. 5 & 6 are with regard to deletion of disallowance of bad debts written off in the sum of Rs.1,85,00,000/- by the ld. CIT(A).

4.1. We have heard rival submissions and perused the materials available on record including certain pages of the paper book which are relevant for adjudication of this issue before us. We find that the assessee is in the business of manufacturing and selling of high pressure seamless cylinders. The assessee had stated before the lower authorities that it had entered into joint venture with M/s. Mechvac Fabricators (I) Pvt.Ltd. in name and style of M/s. Racho Precision Engineering Pvt. Ltd wherein the assessee had held a stake of 62% and M/s. Mechvac Fabricators (I) Pvt. Ltd. held a stake of 38%. The then Managing Director of M/s. Mechvac Fabricators (I) Pvt. Ltd. was a technocrat in the field of precision engineering. M/s. Racho Precision Engineering Pvt. Ltd. was formed to take up specialized jobs of flow forming. It was further submitted by the assessee that it was facing stiff competition from China and export sales were suffering. To compete in the market, the assessee felt a need to change the product to a higher grade. With respect to the same, the assessee paid an advance to M/s. Racho Precision Engineering Pvt. Ltd. to provide a guaranteed supply of raw material i.e. thin wall high pressure pipes for cylinders. We find that the aforesaid primary facts stated by the assessee are not in dispute. The assessee submitted a letter dated 12/01/2016 before the ld. AO attaching a copy of the letter dated 12/08/2010 written by the assessee to Mr. Raj Chodankar. For the sake of convenience, the said letter dated 12/08/2010 addressed by the assessee to M/s. Racho Precision Engineering Pvt Ltd., is reproduced hereunder:-

RAMA CYLINDERS PVT. LTD.
MANUFCTURER OF HIGH PRESSURE SEAMLESS STEEL CYLINDERS
CNG, INDUSTRIAL GASES & FIRE FIGHTING APPLICATIONS
181, Maker Tower, Cuffe Parade. Mumbai -400005. Maharashtra India.
Tel: (91-22) 2216 2344 /45 / 46, (91-22) 22154294
E-mail: in1oramacyIinders.in. www.ramacylirldes.ifl
CIN:U281I3MH2004PTC 149620

August 12,2010

Racho Precision Engineering Private Limited
D-112,** TTC Industrial Area **MIDC, Navi
Mumbai – 400 706

Kind Attn: Mr. Raj Chodankar, MD

***Dear** Sir,*

Sub: Advance against setting up of project

Further to our Joint Venture Agreement and setting u of the Company, Racho Precision Engineering Pvt. Ltd., we would be advancing funds to you in the proportion of 62% by us i.e. Rama Cylinders Private Limited (RCPL) and 38% by 'Mechvac Fabricators (I) Pvt. Ltd., for setting up the project - for building the shed, purchase, and installation of various machines and equipment, deposits for increasing the power load etc. from time to time.

- *As agreed, Racho would undertake the job-work of RCPL viz, reducing the wall size of tubes for the purpose of manufacture of CNG cylinders, as per requirements, on concessional rates.*
- *The amount advanced by us would be interest fee.*
- *This advance would be adjusted in future against job work of RCPL that would be undertaken by you in future.*

We look forward to healthy and long-term association.

Thanking you,
For Rama Cylinders Private Limited

Managing Director

4.2. We also find that M/s. Racho Precision Engineering Pvt. Ltd., had addressed a letter to the assessee on 14/08/2010 accepting to the jobs entrusted by the assessee to them on receipt of advances from the

assessee. For the sake of convenience, the said letter dated 14/08/2010 is reproduced hereunder:-

RACHO PRECISION ENGINEERING PVT. LTD.
0-112., TTC INDUSTRIAL AREA, NERUL NAVI MUMBAI - 400 706 (INDIA)
TEL:022-276708 13. E-mail: racho.precision@rediffmail.com

August 14, 2010

Rama Cylinders Private Limited
***18** 1, Maker Tower E Cuffe Parade*
Mumbai-400 005

Dear Sir,

Req: Advance payments against new project

With reference to your letter dated August 12, 2010, for making payments to us or on behalf of us, in respect of setting up of our project, we confirm as below:

1. Besides other jobs of flow-forming, we would undertake the jobs entrusted by Rama Cylinders Private Limited, as per requirements and specifications given from time to time.
2. The payments/advances as aforesaid, would not bear any interest.
3. The said advances would be adjusted in future against the job work undertaken by us.

Looking forward to long term business relations, we remain,
Yours Sincerely
For Racho Precision Engineering Private Limited

Rajerdra Chodankar
Managing Director

4.3. Thus, it could be seen that effectively the assessee had paid advances for future supply of raw materials to manufacture higher grade product in order to gain advantage in the revenue field by increasing the productivity of the products manufactured by the assessee in the competitive market. This clearly proves the business nexus and the commercial expediency of advances paid by the assessee in the normal course of its business. In these facts and circumstances, the assessee

had chosen to write off the advances of Rs.1,85,00,000/- paid in the normal course of its business. The business nexus of these advances had already been highlighted by us supra and is also evident from the aforesaid correspondences dated 12/08/2010 and 14/08/2010 supra. We find that had the proposal for which these advances were made fructified, the assessee would have certainly derived advantage in the revenue field by manufacturing a higher grade product by constant supply of raw materials to that effect so as to stay afloat in the competitive market. In these circumstances, it would be unjust to say that assessee had made advance for a new product as such which is capital in nature. It could not be denied that there is absolutely no asset that has come into existence in the hands of the assessee so as to enable it to capitalize in its books and claim depreciation thereon. Hence, the advance which was paid in the regular course of its business, which became irrecoverable due to various factors which had been highlighted hereinabove had to be written off in the normal course of its business, which results in a trading loss for the assessee. The irrecoverability of these advances paid by the assessee from the said party is not in dispute. This trading loss is squarely allowable as deduction u/s. 28 of the Act. We find that the ld. AO and the ld. CIT(A) had proceeded on the wrong section of applicability of Section 36(1)(vii) of the Act to the aforesaid transaction merely going by the nomenclature used by the assessee in its accounts i.e., "bad debts written off". We hold that it is effectively advances written off by the assessee which was paid in the normal course of its business. It is well settled and trite law that the substance of transaction would always prevail over its form. We find that the ld. DR had vehemently argued that assessee had changed its stand before the ld. CIT(A) by placing completely different version altogether. The aforesaid correspondences and the narration of facts would clearly go to prove that there is absolutely no change in the

stand by the assessee, hence, we are not inclined to agree to the contentions of ld. DR. We find that assessee had placed reliance on the decision of Hon'ble Jurisdictional High Court in the case of IBM World Trade Corporation reported in 186 ITR 412 (Bom) which are squarely applicable to the facts of the case. In that case, the facts were as under:-

> *"2. The assessee-company is a non-resident company. It is engaged in the business of manufacture of accounting and computing machines which are sold or given on hire and of giving services in respect of the same. The assessment year involved is 1965-66. The assessee-company entered into an agreement with one Mr. Sunder Waney, the landlord of the premises, on March 2, 1969 (1960). The landlord undertook to construct a factory together with a garage and a two-room flat on the plot of land situated at Kurla and to grant a lease of the said premises to the assessee-company for a period of ten years renewable for a further period of five years at the option of the assessee-company for the compensation fixed in the agreement. Three more agreements were entered into by the assessee-company with the said landlord in this connection from time to time. In order to facilitate speedy construction, the assessee-company, by one of these agreements, advanced a total sum of Rs. 99,888 to the landlord till 1963. As the landlord became insolvent, the entire amount of Rs. 1,08,088 inclusive of interest and the principal amount advanced was written off by the assessee-company.*
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> *3. The assessee claimed the aforesaid amount of Rs. 1,08,088 as a business loss. The claim was disallowed by the Income-tax Officer and the disallowance was confirmed by the Appellate Assistant Commissioner who, inter alia, observed that the agreement had nothing to do with the current business of the assessee and related to a capital project and in connection with the setting up of a new factory. The Tribunal agreed with the Appellate Assistant Commissioner and maintained the disallowance. According to the Tribunal, the assessee-company was not able to show from the agreements or the correspondence produced in that behalf that the amounts were paid as loans and were to be adjusted against the rent as and when due after the occupation of the said premises. It also took the view that the claim could not be allowed under Section 36(2)(i)(a) as the amount was not advanced by the assessee in the course of banking or money-lending business, The claim could not also be allowed under Section 37 as the amounts were advanced in the earlier years and thus could not represent the expenditure of the year."*

The crucial arguments advanced by the ld. Counsel of the assessee in case of IBM World Trade Corporation reported in 186 ITR 412 (Bom) were as under:-

> *"5. Lastly, Shri Dastur referred to the Supreme Court's decision in CIT v. Mysore Sugar Co. Ltd. [1962] 46 ITR 649, and relied upon the following observations at page 653 :*
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> > *"To find out whether an expenditure is on the capital account or on revenue, one must consider the expenditure in relation to the business. Since all payments reduce capital in the ultimate analysis, one is apt to consider a loss as amounting to a loss of capital. But this is not true of all losses, because losses in the running of the business cannot be said to be of capital. The questions to consider in this connection are : for what was the money laid out ? Was it to acquire an asset of an enduring nature for the benefit of the business, or was it an outgoing in the doing of the business ? If money be lost in the first circumstance, it is a loss of capital, but if lost in the second circumstance, it is a revenue loss. In the first, it bears the character of an investment, but in the second, to use a commonly understood phrase, it bears the character of current expenses."*
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> *6. He also referred to the Allahabad High Court's decision in CIT v. Jwala Pd. Radha Kishan [1977] 107 ITR 540, where the difference of Rs. 44,234 representing the amount along with interest advanced by an assessee, a sole selling agent, to the company and the shares that it got in lieu thereof was treated as a bad debt. Reliance was also placed on the Calcutta High Court's decision in CIT v. Baldeoram Beharilal [1975] 99 ITR 108. In that case, the amounts advanced by the assesses to an under-broker from time to time to be adjusted against his under-brokerage were written off as loss in a subsequent year in which the under-broker had expired. Shri Dastur also referred to and relied on the Madras High Court's decisions in CIT v. Textool Co. Ltd. [1982] 135 ITR 200 and CIT v. Madras Auto Service Ltd. [1985] 156 ITR 740. Lastly, Shri Dastur stated that the principles as regards the question whether an expenditure results in an advantage of enduring nature and whether every advantage of enduring nature is to be disallowed as a capital expenditure are found in the Supreme Court decision in the case of Empire Jute Co. Ltd. v. CIT [1980] 124 ITR 1, where it was held that every advantage of enduring nature acquired by an assessee does not bring the case within the principle laid down in that case. What is material to consider is the nature of the advantage in a*

commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test.

7. Shri Dastur thus summed up his argument by saying that the amounts were advanced by the assessee for enabling him to acquire the factory premises with some other structure thereon, on lease, that ordinarily acquisition of an immovable property on lease is not a capital asset and that, therefore, the moneys advanced for such a purpose will be an advance on business account Consequently, if such an amount is lost for some reason, the loss will also be business loss."

The decision rendered by the Hon'ble Jurisdictional High Court is as under:-

"12. The question that arises for consideration is whether the fact that in the present case the amounts have been advanced to the landlord in pursuance of the agreement before the execution of the lease deed would make any difference. In our opinion, it will not. It is not disputed that the assessee required factory premises for its business and that it did not get a ready factory for that purpose. It took a business decision to enter into agreements with the landlord who owned the land which did not have the factory shed and other structures required by the assessee. The landlord expressed difficulty in constructing the factory building and other structures. The assessee, in pursuance of other agreements entered into, advanced moneys which were in the beginning to be adjusted against the future rents, but subsequently were agreed to be refunded to the assessee on a fixed date. It is true that if the landlord had failed to construct the factory building and other structures as agreed to, the agreements would have fallen through and there was no penalty clause as such. However, one cannot get away from the fact that all this was done by the assessee with a view to acquire the factory premises on lease. The mere fact that the factory would be ready in a year or so would not make any difference.

13. We are in agreement with Shri Dastur that the principles in this regard are laid down by the Supreme Court in its judgment in CIT v. Mysore Sugar Co. Ltd. [1962] 46 ITR 649. The relevant observations in this case have already been noted by us earlier in Empire Jute Co. Ltd. v. CIT . Apart from the fact that this court had already held that the length of the lease agreement is not very material for the purpose of determining the nature of the expenditure incurred on lease agreements, the Supreme Court has clearly laid down in Empire Jute Co. Ltd. [1980] 124 ITR 1, that even assuming that a lease for a period of 10, 15 or 20 years would amount, to an advantage of enduring nature, it is not that every advantage

of enduring nature would result in a capital outlay. What is required to be seen is whether the advantage of enduring nature is in the capital field. As the acquisition of premises on lease would not ordinarily be in the capital field, we have no hesitation in holding that the moneys advanced by the assessee in pursuance of these agreements to the landlord for the purposes of and in connection with the acquisition of the premises on lease were for the purpose of business. Naturally, therefore, when such advances are lost to the assessee, the loss would be a business loss and not a capital loss. The decisions relied upon by Dr. Balasubramanian, according to us, have no bearing on the question involved herein. In the Supreme Court decision, the question was of a third party's liability to pay estate duty and the discharge by an assessee. It was obviously a purpose unconnected with the business of the assessee. The other two decisions, viz., Uttar Bharat Exchange Ltd. v. CIT [1965] 55 ITR 550 (Punj) and Taj Mahal Hotel v. CIT [1967] 66 ITR 303 (AP) refer to the expenditure incurred by an assessee on alterations and additions made by an assesses in leasehold premises. No doubt, such expenditure was held to be of capital nature. We fail to understand how those decisions have any bearing on the point in issue before us.

14. Having regard to the above discussion, the question posed before us is answered in the affirmative and in favour of the assessee. No order as to costs."

4.4. We also find that the ld. AR had placed reliance on yet another decision of Hon'ble Jurisdictional High Court in the case of Harshad J Chokshi vs CIT reported in 349 ITR 250 (Bom) wherein it was held as under:-

"10. Our opinion is sought on the issue, whether if an amount is held to be not deductible as a bad debt, in view of non compliance of the condition precedent as provided under Section 36(2) of the Act, could the same be considered as a allowable business loss. The Tribunal in its order dated 19.12.1994 has not considered the issue, whether or not a loss claimed by the assessee is allowable as a business loss on the basis of the evidence produced by the assessee. The Tribunal proceeded on a premise that once a claim is made for deduction as bad debts, then the deduction can be granted only if the provision of Section 36 of the Act are satisfied and it is not open to an assessee to claim a deduction in the alternative under any other provision of the Act. In view of the above, we are not making any observation with regard to whether the claim of the assessee on merits is allowable as a business loss. We are only examining the issue posed for us

viz. that when the claim made for bad debts is not satisfied, could it be considered as a allowable business loss.

11. Section 28 of the Act imposes a charge on the profits or gains of business or profession. The expression "Profits and gains of business or profession" is to be understood in its ordinary commercial meaning and the same does not mean total receipts. What has to brought to tax is the net amount earned by carrying on a profession or a business which necessarily requires deducting expenses and losses incurred in carrying on business or profession. The Supreme Court in the matter of Badridas Daga v. Commissioner of Income Tax, reported in 34 ITR page 10, has held that in assessing the amount of profits and gains liable to tax, one must necessarily have regard to the accepted commercial practice that deduction of such expenses and losses is to be allowed, if it arises in carrying on business and is incidental to it.

12. On the basis of the aforesaid decisions, it can be concluded that even if the deduction is not allowable as bad debts, the Tribunal ought to have considered the assessee's claim for deduction as business loss. This is particularly so as there is no bar in claiming a loss as a business loss, if the same is incidental to carrying on of a business. The fact that condition of bad debts were not satisfied by the assessee would not prevent him from claiming deduction as a business loss incurred in the course of carrying on business as share broker.

13. In fact this court in the matter of Commissioner of Income Tax v. R.B. Rungta and Co. (Supra) upheld the finding of the Tribunal that the loss could be allowed on general principles governing computation of profits under Section 10 of the Indian Income Tax Act, 1922 which is similar/identical to Section 28 of the Act. The revenue in that case urged that the assessee having claimed deduction as a bad debt the benefit of the general principle of law that all expenditure incurred in carrying on the business must be deducted to arrive at a profit cannot be extended. This submission was negatived by this court and it was held that even where the debt is not held to be allowable as bad debts yet the same would be allowable as a deduction as a revenue loss in computing profits of the business under Section 10(1) of the Indian Income Tax Act, 1922.

In view of the above, the question as referred to us is answered in the affirmative i.e. in favour of the assessee and against the respondent. No order as to costs."

4.5. In view of the aforesaid observations and in the facts and circumstances of the instant case and respectfully following the aforesaid

judicial precedents, we hold that the assessee is entitled for deduction of advances written off in the sum of Rs.1,85,00,000/- as the trading loss allowable as deduction u/s.28 of the Act. Accordingly, the ground Nos.5 & 6 raised by the revenue are dismissed.

5. Ground No. 7 raised by the revenue is general in nature and does not require any specific adjudication.

6. In the result, appeal of the revenue is dismissed.

Order pronounced in the open court on this 11/09/2019

Sd/-	**Sd/-**
(RAM LAL NEGI)	**(M.BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 11/09/2019
KARUNA, *sr.ps*

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai