

IN THE INCOME-TAX APPELLATE TRIBUNAL "I" BENCH MUMBAI
BEFORE SHRI G.S. PANNU, VICE-PRESIDENT AND
SHRI PAWAN SINGH JUDICIAL MEMBER
ITA No. 3637/Mum/2017 (Assessment Year 2011-12)

The Parthenon Group India LLC (India Branch), 3 rd Floor, Hoechst House, 193, Backbay Reclamation, Nariman Point, Mumbai-400021. PAN: AACCT8676L	Vs.	DDIT (International Taxation) -4(2), Air India Building, Nariman Point, Mumbai-400020.
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----	----------------------------------------------------------------------------------------------------

Appellant

Respondent

Appellant by : Shri Ketan K. Ved with
Ms. V.A. Mehta (AR)

Respondent by : Shri Nishant Somaiya (DR)

Date of Hearing : 05.09.2019

Date of Pronouncement : 15.10.2019

ORDER UNDER SECTION 254(1) OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. This appeal by assessee is directed against the order of Id. CIT(A)-58, Mumbai dated 04.01.2017, which arises from the assessment order under section 144C(4) read with section 143(3) of the Income Tax Act (the Act) for Assessment Year 2011-12. The assessee has raised the following grounds of appeal:

1 : 0 Re.: Not allowing the carry forward and set off of un utilized business loss of Rs.1,41,30,417/-:

1 : 1 The Commissioner of Income-tax (Appeals) ["CIT(A)"] has erred in confirming the action of the Assessing Officer in not considering the carry forward and set off of unutilized business loss of Rs. 1,41,30,417 pertaining to the Assessment Year 2008-09 for setting off against income of the subsequent years.

- 1 : 2 The CIT(A) has erred in confirming the action of the Assessing Officer in considering that the appellant is eligible to claim brought forward loss of Rs. 8,01,34,063 only as per the order passed under section 143(3) of the Income Tax Act, 1961 ("the Act") for assessment year 2009-10.
- 1 : 3 The CIT(A) has erred in confirming the action of the Assessing Officer in holding that Rs. 2,80,55,620 adjusted in the assessment year 2010-11 pertains to assessment year 2009-10 and not to assessment year 2008-09.
- 1 : 4 The Appellant submits that considering the facts and circumstances of the case and the law prevailing on the subject it is entitled to carry forward the business loss pertaining to the Assessment Year 2008-09 for setting off against its income for the subsequent years and the Commissioner of Income-tax (Appeals) ought to have held as such.
- 1 : 5 The Appellant submits that the Commissioner of Income-tax (Appeals) has erred in arriving at various unwarranted and erroneous conclusions / allegations without discussing it with the Appellant and has held that it is not eligible to carry forward and set-off business loss of Assessment Year 2008-09.
- 1 : 6 The Appellant submits that the Assessing Officer be directed to allow it to carry forward the business loss pertaining to Assessment Year 2008-09 for setting it off against its income of the subsequent years.

2 : 0 Re.: Not allowing the carry forward and set off of unabsorbed depreciation of Rs.5,39,792/-:

- 2 : 1 The Commissioner of Income-tax (Appeals) has erred in upholding the action of the Assessing Officer of not allowing the Appellant to carry forward the unabsorbed depreciation of Rs. 5,39,792/- pertaining to the Assessment Year 2008-09 for setting off against income of the subsequent years.
- 2 : 2 The Appellant submits that considering the facts and circumstances of the case and the law prevailing on the subject it is entitled to carry forward the unabsorbed depreciation pertaining to the Assessment Year 2008-09 for setting off against its income for the subsequent years and the Commissioner of Income-tax (Appeals) ought to have held as such.
- 2 : 3 The Appellant submits that the Commissioner of Income-tax (Appeals) has erred in arriving at various unwarranted and erroneous conclusions /

allegations without discussing it with the Appellant and has held that it is not eligible to carry forward and set-off unabsorbed depreciation of Assessment Year 2008-09.

2 : 4 The Appellant submits that the Assessing Officer be directed to allow to it to carry forward the unabsorbed depreciation of Assessment Year 2008-09 for setting it off against its income for the subsequent years and oblige.

2. Facts in brief are that the assessee is a company USA based entity and engaged in providing strategic advisory & consultancy services, filed its return of income for Assessment Year 2011-12 on 30.04.2012 Nil income and book profit under section 115JB of Rs. 8,31,76,898/-. In the computation of income the assessee claimed set off of brought forward losses of earlier years of Rs. 6,27,07,119/- and unabsorbed depreciation of Rs. 62,761/-. The case was selected for scrutiny and after serving the statutory notice under section 142(1) & 143(2) the assessing officer passed draft assessment on 31.10.2013, which was served on the assessee on 04.11.2014. The assessee vide its application filed on 04.02.2014 exercised its option and intimated that they would file appeal before CIT(A), instead of filing objections before Dispute Resolution Penal (DRP). Accordingly the assessing officer passed the final assessment order under section 144C(4) rws 143(3) on 11.02.2014.

The assessing officer while passing order held as under

“ 5. ----- . The assessee has already availed set off loss in earlier years as follows.

B/f set off loss of AY 2009-10 as per 143(3) order dated 08/12/2011

- Rs.8,01,34,063/-

Loss already set off as per 143(3) order dt. 26/03/2013 of AY 2010-11
-Rs. 2,80,55,620/-

Balance to be forward - Rs. 5,20,78,443/-

It is seen from the above that the assessee has already carried forward loss of Rs. 5,20,78,443/- to be set off hence the assessee is allowed set of Rs. 5,20,78,443/- out of Rs. 6,27,07,119/-. Balance will be taxed as per law. Further set of unabsorbed depreciation of AY 2008-09 as claimed by the assessee in the computation is also disallowed as there is no carry forward of unabsorbed depreciation as per 143(3) order dated 26/03/2013 of AY 2010-11. Hence, interest income of assessee is not allowed to be set off and the same is taken in the income of the assessee.”

3. On appeal before Id. CIT (A), the assessee stated that the assessing officer failed to consider the losses of AY 2008-09 which has been shown in the return of income and carried forward in the subsequent years for being set off. The assessee also provided the working of brought forward losses and unabsorbed depreciation of various years in the following manner:-

Particulars	Business loss -Rs.	Unabsorbed depreciation Rs.	Total Rs.
AY 2008-09	1,41,30,417	5,39,792	1,46,70,209
AY 2009-10	8,01,34,063	25,41,927	8,26,75,990
Less: set-off against	(2,79,89,920)	(65,696)	(2,80,55,616)
Income of AY 2010-11			
Balance to be carried forward to AY 2011-12	6,62,74,560	30,16,023	6,92,90,583
Less: set off against income for the year under consideration viz, AY 2011-12	(6,27,07,119)	(62,721)	(6,27,69,840)
Balance to be carried forward	35,67,441	29,53,302	65,20,743

4. The assessee also urged that the assessing officer denied the set off of unabsorbed depreciation and business loss of AY 2008-09 by taking view that the said carried forward of loss has not been determined as per section 143(3) for AY 2009-10 and 2010-11. The assessee also submitted that the assessing officer in AY 2009-10 did not mentioned the fact of brought forward losses of AY 2008-09 and only dealt losses shown in AY 2009-10. It was brought to the notice of Id CIT(A) that the assessee has already filed a rectification application on 23.12.2013 for necessary rectification in the assessment order for AY 2009-10, which has not been disposed off by the assessing officer. The assessee also stated that the assessing officer has not allowed the depreciation of Rs.25,41,927/- which has been allowed to be carried forward in the assessment order of AY 2009-10.
5. The Id CIT(A) after considering the submissions of the assessee concluded that the return filed by the assessee for AY 2008-09 is without digital signature and the assessee filed unaudited accounts. Thus, the return was not a valid return and the revised return filed by the assessee was filed beyond the time allowed by section 139(1). For unabsorbed depreciation of Rs. 25,41,927/-, the Id CIT(A) directed the AO to allow the set off while computing taxable income. Aggrieved by the order of the Id CIT(A), the assessee has filed present appeal before this Tribunal by raising the grounds of appeal as referred above.

6. We have heard the submissions of the ld. authorised representatives (AR) for the assessee and the learned departmental representative (ld. DR) for the revenue and gone through the orders of the authorities below. The ld. AR for the assessee submits that the assessee filed its return of income for the first time in AY 2008-09 and claimed carry forward of unabsorbed loss of Rs. 1,41,30,417/- and depreciation of Rs. 5,39,792/- against the income of subsequent year. The return was not selected for scrutiny nor was defect notice issued to the assessee. For AY 2009-10 the assessee filed return of income, the assessee was eligible to carry forward loss of Rs. 8,26,75,990/- and unabsorbed depreciation of Rs. 25,41,927/- for set of income of subsequent year. The assessing officer assessing officer confirmed the loss and depreciation in the assessment order for AY 2009-10 passed under section 143(3) dated 08.12.2011. The AO while determining the loss has not considered the loss of AY 2008-09. The assessee filed application under section 154 for rectification of the assessment order for AY 2009-10, which has not been decided by the AO. Though, the AO has quantified the unabsorbed depreciation for AY 2009-10 and 2010-11 in assessment order dated 08.12.2011 and 26.03.2013 respectively, yet the AO has not considered the same in the year under consideration. The ld CIT(A) confirmed the order of the AO by taking view that for AY 2008-09 the return filed by the assessee contained false verification as well as

the assessee filed unaudited accounts. Thus, the return was not a valid return and the revised return filed by the assessee was filed beyond the time allowed by section 139(1). The Id CIT(A) failed to appreciate the facts as explained by the assessee and concluded that the return filed for AY 2008-08 was not a valid return as it was filed without a digital signature and mentioned that the assessee was not required to obtain audit report. The assessee was not liable for audit as the turnover of the assessee was less than the prescribed limit of Rs.40 lakhs.

7. On the other hand the Id. DR for the revenue supported the order of the lower authority. The Id DR for the revenue further submits that the Id CIT(A) in para 6.3.4 of its order has categorically held that the business turnover of the assessee for AY 2008-09 was in excess of limit prescribed for Audit in section 44AB, therefore, the accounts of the assessee was liable to be audited. The turnover of the assessee for AY 2008-09 was Rs. 16,38,895/-, which was above the limit of Rs.10 lakhs. The assessee has shown the profession of consultancy the service code of the assessee was 'Code- 0703'. The detailed filed by the assessee in ITR-6 was not appropriately filed up. The assessee in the relevant column prescribed for providing information, if the assessee is liable to maintain accounts as per section 44AA/ 44AB has mentioned –No. The assessee has not adhered to the prescribed guideline, hence, the action of

ld. CIT (A) in treating that the return of income for AY 2008-09 is not valid, is correct.

8. In the rejoinder submissions the ld. AR for the assessee submits that the provisions of section 44AB relating to obtaining tax audit report are not applicable to the assessee. The time limit for the business carried out by the assessee was Rs. 40 lakhs. The ld. AR further submits that firstly code No.703 is for “service sector – consultancy services”, secondly, the code for professional is from 601 to 607. The ld. AR also placed the copy of instruction for filing Form ITR-6 for A.Y. 2008-09. It was pointed out that the nature of business selected by assessee in original as well as in revised return respectively is Code No. 0703, which is for “service sector-consultancy services”. The allegation of revenue raised by ld. DR and the ld. CIT(A) that return of income for A.Y. 2008-09 is not a valid return because of a false verification in the return Form is incorrect, is uncalled for. The ld. AR of the assessee in his without prejudice submission submitted that assuming without admitting that there was an incorrect entry in the return Form, even then, in that position, a defect notice as mandated under section 139(9) and 292B ought to have been issued by Assessing Officer to rectify such mistake or defect. In support of his submission, the ld. AR of the assessee relied upon the decision of Hon’ble Punjab & Haryana High Court in CIT vs. Sohan Lal Chhajan Mal [(2008) 307 ITR 53 (P&H)], wherein it was

held that a defect return cannot be regarded as invalid return ipso facto. It may assume the character of invalid return, if the defect notice has not been removed by the assessee.

9. We have considered the rival submissions of the parties and have perused the material on record. There is no dispute that in the return for A.Y. 2008-09, the assessee claimed business loss of Rs. 1,41,30,417/- and unabsorbed depreciation of Rs. 5,39,792/-. The return was not selected for scrutiny. Admittedly, no intimation under section 143(1) was issued to the assessee. The assessee again claimed business loss and unabsorbed depreciation for A.Y. 2009-10, the return of income was selected for scrutiny and assessment order under section 143(3) was passed, wherein the Assessing Officer quantified business loss eligible for carry forward of Rs. 8,01,34,063/- and unabsorbed depreciation of Rs. 25,41,927/-. The Assessing Officer allowed set off of business loss of Rs. 2,79,89,920/- and unabsorbed depreciation of Rs. 65,696/- in assessment order dated 08.12.2011. We have noted that while passing the assessment order for A.Y. 2009-10, the Assessing Officer not considered the fact of brought forward losses of A.Y. 2008-09 and only dealt with the losses shown in A.Y. 2009-10. Before us, the Id. AR of the assessee vehemently submitted that the assessee has already filed an application dated 23.12.2013 under section 154 for rectification of order on the ground that taxable income for A.Y. 2008-09 has been accepted,

therefore, the loss for said period is to be determined for carry forward. Copy of the application acknowledged by Assessing Officer is placed on record vide page no. 84 of the Paper Book. It was also brought to our notice that the said rectification application is still not disposed off by the Assessing Officer. We have further noted that this fact was also brought to the notice of Id. CIT(A), which has been duly recorded in para-6.2.3 of the impugned order. The Id. CIT(A) instead of directing the Assessing Officer to dispose of the rectification application, treated the return for A.Y. 2008-09 as invalid return on the ground that return filed on 30.09.2008 in the form of e-return is without digital signature and further held that the assessee was liable to maintain accounts under section 44A and the same has not been audited. The Id. CIT(A) further held that the turnover of the assessee is a excess of limit prescribed for audit in section 44AB, the assessee was required to have the account audited while filing return of income and the assessee filled up a false entry in the relevant column that assessee was not subject to audit and unaudited accounts have been filed. Accordingly, the Id. CIT(A) further noted that second return filed by assessee is beyond the time limit allowed under section 139(1), once return is not valid, the assessee is not entitled for carry forward of losses in the return of income, in the light of provisions of section 80. Thus, the assessee was held not eligible to carry forward losses.

10. Before us, the ld. AR of the assessee vehemently relied upon the decision of Hon'ble Punjab & Haryana High Court in CIT vs. Sohan Lal Chhajan Mal (supra) wherein it was held that there is statutory difference recognised between a 'defective return' and 'invalid return'. In cases where Profit & Loss A/c and Balance-sheet are not accompanying the return of income, it would be regarded as defective in contra distinction to invalid return. It was also held that a defective return cannot be regarded as invalid return as ipso facto. It may assume the character of invalid return, if the defect after due notice has not been removed by the assessee. There is no dispute that the return of income for A.Y. 2008-09 was not selected for scrutiny. The assessee was not given notice of defect about the alleged non-signing by way of digital signature. Similarly, no such notice that assessee-company was subject to audit for the said year. Therefore, considering the facts and circumstances of the case and the decision of Hon'ble Punjab & Haryana High Court in in CIT vs. Sohan Lal Chhajan Mal (supra) wherein it was held that a defective return cannot be regarded as invalid return as ipso facto, it may assume the character of invalid return, if the defect after due notice has not been removed by the assessee. Accordingly, we held that the return of AY 2008-09 cannot be treated as invalid return. Hence, we restore both the grounds of appeal raised by the assessee to the file of AO to decide pending application of the

assessee for rectification of assessment order for AY 2009-10 and thereafter, decide both the issue afresh in accordance with law. Needless to order that before deciding the issues the AO shall grant opportunity to the assessee. The assessee is given liberty to raise all factual and pleas before the assessing officer.

11. In the result, appeal of the assessee is allowed for statistical purpose.

Order pronounced in the open court on 15/10/2019.

Sd/-
G. S. PANNU
VICE-PRESIDENT

Sd/-
PAWAN SINGH
JUDICIAL MEMBER

Mumbai, Date: 15.10.2019

SK

Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "I" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai