

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "B", MUMBAI**

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND  
SHRI RAJESH KUMAR, HON'BLE ACCOUNTANT MEMBER**

**ITA No. 6202/MUM/2017 (A.Y:2013-14)**

**ITA No. 1157/MUM/2018 (A.Y:2014-15)**

**ITA No. 1169/MUM/2018 (A.Y:2012-13)**

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| Income Tax Officer – 17(2)(4)<br>Room No. 134<br>Aayakar Bhavan, M.K. Road<br>Mumbai – 400 020 | v. | M/s. Narshi Nenshi & Sons<br>257/65, Narshi Natha Street<br>Masjid Bunder (W)<br>Mumbai – 400 009<br><br><b>PAN: AAHFN0711C</b> |
| <b>(Appellant)</b>   |    | <b>(Respondent)</b>   |

**C.O. No. 54/MUM/2019**

**[ARISING OUT OF ITA No. 6202/MUM/2017 (A.Y:2013-14)]**

**C.O. No. 131/MUM/2019**

**[ARISING OUT OF ITA No. 1157/MUM/2018 (A.Y:2014-15)]**

**C.O. No. 323/MUM/2018**

**[ARISING OUT OF ITA No. 1169/MUM/2018 (A.Y:2012-13)]**

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| M/s. Narshi Nenshi & Sons<br>257/65, Narshi Natha Street<br>Masjid Bunder (W)<br>Mumbai - 09<br><br><b>PAN: AAHFN0711C</b> | v. | Income Tax Officer – 17(2)(4)<br>Room No. 134<br>Aayakar Bhavan, M.K. Road<br>Mumbai – 400 020 |
| <b>(Appellant)</b>   |    | <b>(Respondent)</b>  |

|                              |          |                             |
|------------------------------|----------|-----------------------------|
| <b>Assessee by</b>           | <b>:</b> | <b>Ms Dinkle Haria</b>      |
| <b>Department by</b>         | <b>:</b> | <b>Ms. Kavita P.Kaushik</b> |
|                              |          |                             |
| <b>Date of Hearing</b>       | <b>:</b> | <b>22.11.2019</b>           |
| <b>Date of Pronouncement</b> | <b>:</b> | <b>10.01.2020</b>           |

## ORDER

### PER C.N. PRASAD (JM)

1. These appeals and cross objection are filed by the revenue and assessee against different orders of the Learned commissioner of Income-tax (Appeals) – 28, Mumbai [hereinafter for short “Ld. CIT(A)"] for the A.Ys. 2012-13 to 2014-15.

2. The revenue in its appeals raised the following common grounds for all the assessment years i.e., A.Y. 2012-13 to 2014-15.

1. *"On the facts & circumstances of the case and in law, the learned CIT(A) has incorrectly allowed the set off of unabsorbed depreciation of the deceased person in the hands of the legal heirs based on section 78(2) of the I. T. Act, whereas, under section 78(2) of the Act only losses are allowed to set off and not any unabsorbed depreciation in the hands of the legal heirs."*

2. *"On the facts & circumstances of the case and in law, the learned CIT(A) has wrongly applied the Hon'ble Supreme Court Judgement in the case of Saroj Aggarwal vs. CIT (1985) 156 ITR 497 (SC), wherein the judgement does not apply to the facts of the case, as it talks about only carry forward and set off of losses and not unabsorbed depreciation."*

3. *"On the facts & circumstances of the case, the order of Ld.CIT(A) is perverse and deserves to be cancelled."*

4. *"The appellant prays that the order of the A.O. should be restored and order of the CIT(A) should be set aside."*

3. The speaking order of the Ld. CIT(A) is for the A.Y. 2013-14 which was followed for the A.Y. 2012-13 and 2014-15. Thus, we take up the appeal for the A.Y. 2013-14 for the sake of convenience.

4. Briefly stated the facts are that, the assessee is a partnership firm engaged in the business of transportation, filed return of income for the A.Y. 2013-14 on 26.09.2013 declaring NIL income after claiming setoff of unabsorbed depreciation. The Assessing Officer while completing the assessment observed that assessee claimed setoff of unabsorbed depreciation pertaining to A.Y. 2007-08 to A.Y. 2011-12 and the assessee was required to give justification for the same, since according to the Assessing Officer assessee has already claimed setoff of unabsorbed depreciation for the A.Y. 2012-13. In response to the query raised by the Assessing Officer the assessee vide letter dated 08.02.2016 furnished its reply stating that Late Mr. Virchand Narshi Soni expired on 08.12.2008. He was carrying on the business under the name and style of Narshi Nanshi & Sons as a proprietor. Assessee submitted that after his demise his legal heirs continued the same business as a partnership firm w.e.f. 09.12.2008 under the same trade name using the same place of business, telephone lines etc. It was also submitted that business recoveries are affected in the firm's name and the subsisting transactions are cleared and the assets of the business are utilized in clearing the liabilities by the heirs in the process of carrying on the business as successors through partnership firm. Therefore, it was contended that as per the provisions of the section 78(2) of the Act the unabsorbed depreciation and business

loss of proprietary concern is to be setoff against the income of the partnership firm. Accordingly, the unabsorbed depreciation and business loss of the erstwhile proprietary concern has been carried forward by the successor partnership firm and setoff against income of the firm.

5. Not convinced with the reply the Assessing Officer disallowed claim for set off of unabsorbed depreciation/business loss observing that unabsorbed depreciation cannot be carried forward for set off by another person other than the person who has incurred depreciation on his fixed assets. The assessee carried the matter before the Ld. CIT(A) and the Ld. CIT(A) following the decision of the Hon'ble Supreme Court in the case of the CIT v. Madhukant M. Mehta [247 ITR 805] allowed the claim of the assessee. Further, reliance was also placed by the Ld. CIT(A) on the decision of the Hon'ble Supreme Court in the case of the Saroj Aggarwal v. CIT [156 ITR 497].

6. Ld. DR vehemently supported the orders of the Assessing Officer and whereas the Ld. Counsel for the assessee strongly placed reliance on the decision of the Hon'ble Supreme Court in the case of the CIT v. Madhukant M. Mehta (supra) and also supported the order of the Ld.CIT(A).

7. We have heard the rival submissions and perused the orders of the authorities below. We observe from the assessment order that the claim for carry forward and setoff of unabsorbed depreciation of proprietary concern against partnership firm has been denied by the Assessing Officer on the ground that the firm cannot claim setoff of unabsorbed depreciation of the proprietary concern. Ld. CIT(A) following the decision of the Hon'ble Supreme Court in the case of the CIT v. Madhukant M. Mehta (supra) allowed the claim of the assessee since there was a succession by the partnership firm from the proprietary concern and the provisions of the section 78(2) of the Act provides for set off of unabsorbed loss/depreciation in cases of inheritance.

8. The Hon'ble Supreme Court in the case of the CIT v. Madhukant M. Mehta (supra) held as under: -

*“4. Madhukant M. Mehta was carrying on proprietary business of speculation in shares, cotton and other commodities. He died on March 23, 1964, leaving behind his widow, a son and a daughter. On April 22, 1964, the three heirs of Madhukant M. Mehta entered into a partnership and executed a partnership deed wherein they agreed to carry on the said business of speculation. In the said speculation business carried on in the name of the partnership firm, profits were earned and the assessee sought to carry forward and set off the losses incurred by the deceased in his proprietary business against the income from the speculation business of the partnership firm. The Income-tax Officer disallowed such set-off on the ground that there was no succession to the business of the deceased. The Appellate Assistant Commissioner dismissed the appeals filed by the assessee but on further appeal the Tribunal allowed the set-off. The Tribunal found that there was succession to the business of the deceased on the basis of the following circumstances (page 163) :*

*"(i) The partnership deed which was drawn up on April 22, 1964, within a month of the death of the deceased, records the fact of the parties thereto as heirs and legal representatives of the deceased, and having succeeded to and carried on the speculation business of the deceased. This claim of the assessee having carried on the speculation business even prior to the date of the partnership deed had not been disputed. Even, if the date of the partnership deed is assumed to be the date from which the business had been carried on under the partnership deed, there was an interval of less than one month between the death of the deceased and the date from which the assessee had carried on the business, and such interval even reckoning the partnership to have commenced from the date of the deed of partnership could not be regarded as longer unusual in a case where succession is claimed to have taken place by inheritance on the death of the deceased.*

*(ii) The nature of the business was identical, namely, speculation business, which was being" carried on by the deceased.*

*(iii) The business name continued to be the same.*

*(iv) The business was carried on in the same premises.*

*(v) The same telephone which was being used by the deceased also continued to be used by the assessee.*

*(vi) The constituents of the assessee's business were the same as those of the business of the deceased.*

*(vii) The partnership deed clearly evidenced the intention of the legal heirs who constituted the assessee-firm to continue and carry on the business which was carried on by the deceased."*

5. The Tribunal held that the partners, as heirs, had succeeded to the business of the deceased and there was inheritance for the purpose of Section 78(2) of the Act. The said finding recorded by the Tribunal has been accepted by the High Court. The High Court has observed (page 169) :

*"At the risk of repetition, it might be stated that the Tribunal has found in the instant case that there was no dispute that even prior to the execution of the partnership deed, the three heirs had carried on the same speculation business and that the partnership was brought into existence within about a month of the death of the deceased. The Tribunal has further found that even after the partnership was brought into existence, the business was continued in the same name and in the same premises and the constituents of the assessee's business were the same as those of the business of the deceased. It has been found earlier that during the interval of time between the death of the deceased and the formation of the partnership the outstanding recoveries were effected and the subsisting transactions were cleared and the assets of the business were utilised in clearing the liabilities by the three heirs in the process of carrying on the business as successors."*

6. Shri Shukla, learned senior counsel appearing for the Revenue, in support of the appeals, has invited our attention to the decision of this court in *Saroj Aggarwal v. CIT* [1985] 156 ITR 497, wherein this court has dealt with the question regarding applicability of Section 78(2) of the Act in the context of succession to the business of a deceased partner in the partnership. In that case, this court has approved the decision of the Bombay High Court in *CIT v. Bai Maniben* [1960] 38 ITR 80, wherein the High Court has observed that the conclusion of the Tribunal as to whether there was succession by inheritance is one of a question of fact.

7. Having regard to the finding recorded by the Tribunal after taking into consideration the facts and circumstances that the partners, as heirs, had succeeded to the business of the deceased which finding has been accepted by the High Court in the present case, we are of the opinion that in the facts of these cases no ground is made out for interference with the impugned judgment of the High Court. The appeals are, therefore, dismissed. No order as to costs."

9. The above decision squarely applies to the facts of the case. Thus, respectfully following the said decisions, we hold that since the proprietary concern was succeeded by the legal heirs and the proprietary business was carried on by the legal heirs of the deceased by converting the same

into partnership firm there is an inheritance of business and therefore, as per the provisions of the section 78(2) of the Act assessee is entitled to setoff business loss/unabsorbed depreciation of the proprietary concern against income of the successor partnership firm. Thus, we sustain the order of the Ld.CIT(A) and reject the grounds raised by the revenue.

10. Coming to the appeals of the revenue for the Assessment Years 2012-13 & 2014-15 grounds are identical to the grounds raised for the A.Y. 2013-14 and the decision taken therein for the A.Y.2013-14 shall applies mutatis mutandis for these assessment years also. We order accordingly.

11. Coming to the cross objections filed by the assessee for the Assessment Years 2012-13 to 2014-15.

12. The first common ground in the cross objection is that the Ld. CIT(A) erred in rejecting the additional ground in respect of expenses/debts which were not claimed in the return of income.

13. Ld. Counsel for the assessee submitted that Ld. CIT(A) did not admit the additional ground following the decision of the Hon'ble Supreme Court in the case of the Goetze ruling [284 ITR 323]. Placing reliance on the decision of the Hon'ble Bombay High Court in the case of the CIT v. Prudvi

Brokers & Shareholders Pvt. Ltd [349 ITR 396], Ld. Counsel for the assessee submitted that additional ground raised by the assessee should have been admitted and disposed off on merits as the First Appellate Authority has the power to entertain the additional claim made by the assessee though such claim was not made in the return of income.

14. Ld. DR vehemently supported the orders of the authorities below.

15. On hearing both the sides and respectfully following the decision of the Hon'ble Bombay High Court in the case of the CIT v. Prudvi Brokers & Shareholders Pvt. Ltd (supra), we restore the claim of the assessee in respect of expenses/debts, to the file of the Ld. CIT(A) who shall decide on merits after providing adequate opportunity of being heard to the assessee.

16. The second ground in the cross objection filed for the A.Y. 2013-14 and 2014-15 is against adhoc disallowance sustained by the Ld. CIT(A) to the extent of ₹.4,89,472/- and ₹.2,00,000/- respectively on account of various expenses.

17. On a perusal of the order of the assessment order, we find that the Assessing Officer for the A.Y. 2013-14 while completing the assessment made disallowance @10% of loading and unloading expenses, hawali

charges incurred by the assessee observing that cash component and element of personal use in the aforesaid expenses cannot be ruled out keeping in view the nature of business of the assessee firm that is transportation, the Ld. CIT(A) sustained the disallowance to the extent of 5% of the expenses as against 10% disallowed by the Assessing Officer. Similarly, for the A.Y. 2014-15 the Ld. CIT(A) restricted the disallowance to ₹.2,00,000/- as against 10% disallowed by the Assessing Officer. Considering the submissions of both the parties and taking the totality of facts and circumstances into consideration we direct the Assessing Officer to restrict the disallowance to ₹.2,00,000/- for both the assessment years i.e. 2013-14 and 2014-15 to meet the ends of justice.

18. In the result, appeals of the revenue are dismissed and the cross objections of the assessee are partly allowed as indicated above.

Order pronounced in the open court on the 10<sup>th</sup> January, 2020

Sd/-  
**(RAJESH KUMAR)**  
**ACCOUNTANT MEMBER**

Mumbai / Dated 10/01/2020  
Giridhar, Sr.PS

Sd/-  
**(C.N. PRASAD)**  
**JUDICIAL MEMBER**

**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, Mum**